90-409

No. ——

FILED
SEP 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

BOSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
*Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*Of Counsel:*
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

Petitioners, who own and farm land within the Westlands Water District in California's Central Valley, are beneficiaries of a 1963 water service contract between the district and the Department of the Interior, and are parties to separate recordable contracts with Interior entered into between 1969 and 1974 pursuant to the service contract. Under these contracts Interior sells water to petitioners to irrigate their land. The only rate of payment in the contracts is the $8.00 per acre foot rate in the service contract. The recordable contracts require petitioners to sell their lands in excess of 160 acres within ten years of execution, or later if such period has been extended. As petitioners were legally precluded from selling their excess lands for a number of years, their holding periods were extended to various dates between 1990 and 1992.

In 1986 Interior and petitioners stipulated to entry of a federal court judgment which, among other things, decreed that Interior should perform the 1963 contract. Until December 1987, Interior supplied water to all lands, including excess lands operated under extended recordable contracts, at the same rate.

On December 22, 1987 Congress passed Section 5302(a) of the Omnibus Budget Reconciliation Act of 1987, which added Section 224(h) to the Reclamation Reform Act. Section 224(h) required landowners operating excess lands under extended contracts thereafter to pay approximately $42.00 per acre foot for water.

Petitioners then instituted proceedings to enforce the 1986 judgment, arguing that Section 224(h), if applicable to them, impaired their contracts and abrogated the judgment, and thus violated the due process and takings clauses of the Fifth Amendment and the separation of powers provisions of the United States Constitution.

The Ninth Circuit held, in a split decision, that neither the contracts nor the judgment explicitly provided that owners of excess lands operated under extended contracts were entitled to $8.00 water. Given its view that the price provisions were unclear, the majority initially held that any ambiguity was to be resolved in favor of the government. In an amendment to the opinion, accompanying the denial of petitioners' petition for rehearing, the court also held that the government's obligations should be construed to avoid foreclosing the exercise of sovereign authority. Since, on this basis, petitioners were held to have no rights, their constitutional claims were not sustained. Alternatively, the majority concluded that petitioners' Fifth Amendment claims were reviewable under the rational basis test, and that it doubted that the separation of powers doctrine bars Congress from increasing even an explicit price term in a judgment.

The questions presented here are these:

1. Where Congress legislates the price term in a pre-existing federal commercial contract, which has been enforced by a federal court judgment, and the legislation is challenged under the Constitution, shall inexplicit price terms in the contract and the court judgment be interpreted in accordance with the ordinary canons of interpretation, taking account of the intent of the parties and their course of performance, or solely in accordance with a special canon of construction, which favors the government and takes no account of such factors?

2. Does the due process or takings clause of the Fifth Amendment of the Constitution, or the separation of powers doctrine thereunder, prohibit Congress from enacting the revenue-raising provisions of Section 224(h), as applied to petitioners?

## RULE 29.1 LIST

Petitioner Boston Ranch Company is a wholly owned subsidiary of J. G. Boswell Company. Petitioner West Haven Farming Co. has no parent company nor any non-wholly owned subsidiary.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| RULE 29.1 LIST | iii |
| TABLE OF AUTHORITIES | vii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| A. Service And Recordable Contracts | 2 |
| B. 1982 Act And Rule 11(i)(4) | 7 |
| C. Amendatory Recordable Contracts | 8 |
| D. Stipulated Judgment | 9 |
| E. The Challenged Statute | 11 |
| F. Motion To Enforce Judgment | 13 |
| REASONS FOR GRANTING THE WRIT | 14 |
| I. THE MAJORITY OPINION CONFLICTS WITH DECISIONS OF THIS COURT | 14 |
| A. The Holding That Inexplicit Terms In Commercial Contracts Or Consent Judgments Against The Government Are Automatically Construed In Favor Of The Government Conflicts With Holdings Of This Court That Such Contracts And Judgments Are Interpreted In Accordance With Ordinary Canons Designed To Effectuate The Intent Of The Parties | 14 |
| 1. The Contracts | 14 |
| 2. The Judgment | 20 |

TABLE OF CONTENTS—Continued

Page

B. The Holding That A Revenue-Raising Statute May Abrogate A Federal Commercial Contract Or Consent Judgment Conflicts With Holdings Of This Court That Congress May Not Abrogate Such Contracts Or Judgment Under The Fifth Amendment And The Separation Of Powers Provisions Of The United States Constitution ..... 22

1. The Contracts ..... 22

2. The Judgment ..... 26

II. THE MAJORITY OPINION DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT ..... 29

CONCLUSION ..... 30

## TABLE OF AUTHORITIESS


| *Cases* | Page |
|---|---|
| *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947) | 17 |
| *Atwater v. United States*, 262 U.S. 495 (1923) | 17 |
| *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980) | 6 |
| *Board of Trade of San Francisco v. Swiss Credit Bank*, 597 F.2d 146 (9th Cir. 1979) | 16 |
| *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) | 15, 16, 26 |
| *California v. United States*, 438 U.S. 645 (1978) | 2 |
| *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) | 14, 15, 16 |
| *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) | 27 |
| *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980) | 5 |
| *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974) | 21, 28 |
| *District of Columbia v. Gallaher*, 124 U.S. 505 (1988) | 17 |
| *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) | 24, 26 |
| *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) | 15 |
| *Garrison v. United States*, 74 U.S. 688 (1869) | 16, 17 |
| *Gordon v. United States*, 117 U.S. 697 (1865) | 28 |
| *Hayburn's Case*, 2 U.S. 409 (1792) | 27 |
| *Hodges v. Snyder*, 261 U.S. 600 (1923) | 28 |
| *Hollerbach v. United States*, 233 U.S. 165 (1914) | 16 |
| *Hughes v. United States*, 342 U.S. 353 (1952) | 20 |
| *Ickes v. Fox*, 300 U.S. 82 (1937) | 24, 26 |
| *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958) | 4 |
| *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir. 1989) | 18 |
| *Larson v. South Dakota*, 278 U.S. 429 (1929) | 15 |
| *Lynch v. United States*, 292 U.S. 571 (1934) | 18, 24, 25, 26, 29, 30 |
| *McCullough v. Virginia*, 172 U.S. 102 (1898) | 28 |
| *National Land for People v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976) | 5 |

TABLE OF AUTHORITIES—Continued

Page

*National Railroad Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451 (1985) ..... 22, 23, 24
*Nebraska v. Wyoming*, 325 U.S. 589 (1945) ..... 24
*Nevada v. United States*, 463 U.S. 110 (1983) ..... 2, 24
*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) ..... 24
*Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935) ..... 24
*Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913) ..... 17
*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421 (1856) ..... 28
*Perry v. United States*, 294 U.S. 330 (1935) ..... 19, 23, 24, 25, 26
*Peterson v. United States Department of the Interior*, 899 F.2d 799 (9th Cir. 1990) ..... 4, 15, 18, 29
*Pope v. United States*, 323 U.S. 1 (1944) ..... 28
*Priebe & Sons v. United States*, 332 U.S. 407 (1947) ..... 16
*Reading Steel Casting Co. v. United States*, 268 U.S. 186 (1925) ..... 16
*The Sinking Fund Cases*, 99 U.S. 700 (1879) ..... 24, 26
*S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946) ..... 18
*System Federation v. Wright*, 364 U.S. 642 (1961) ..... 27, 28
*Tulelake Irrigation District v. United States*, 342 U.S. 447 (Ct. Cl. 1965) ..... 18
*United States v. Armour & Co.*, 402 U.S. 673 (1971) ..... 21
*United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959) ..... 20, 21
*United States v. Bostwick*, 94 U.S. 53 (1877) ..... 17
*United States v. Coachella Valley County Water District*, 111 F. Supp. 172 (S.D. Cal. 1953) ..... 18
*United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) ..... 2
*United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) ..... 20

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Klein*, 80 U.S. 128 (1871) | 27 |
| *United States v. Larionoff*, 431 U.S. 864 (1977) | 19, 29 |
| *United States v. O'Grady's Executors*, 89 U.S. 641 (1875) | 28 |
| *United States v. Seckinger*, 397 U.S. 203 (1970) | 16, 17, 18 |
| *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) | 28 |
| *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989) | 23 |
| *United States v. Standard Rice Co.*, 323 U.S. 106 (1944) | 16 |
| *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) | 28 |
| *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) | 23 |
| *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) | 19, 24, 25, 29 |


*Statutes*


| | |
|---|---|
| 2 United States Code | |
| § 632(a)(2) | 12 |
| § 634(a)(2) | 12 |
| § 639 | 12 |
| § 641(a)(2) | 12 |
| § 641(d)(2) | 12 |
| 28 United States Code | |
| § 1254(1) | 1 |
| 43 United States Code | |
| § 390cc(a) | 7 |
| § 390cc(b) | 7,29 |
| § 390cc(c) | 1, 7 |
| § 390ee(c) | 1, 8 |
| § 390ii(e) | 1, 7 |
| § 390ww(h) | 2, 11 |
| § 423d | 26 |
| § 423e | 3 |
| § 469 | 26 |
| § 485b | 26 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| § 485h(a) | 2 |
| § 485h(e) | 3 |
| § 485h-2 | 26 |
| Public Law No. 86-488, 74 Stat. 156 (1960) | 2 |
| Public Law No. 99-190, 99 Stat. 1320 (1985) | 9 |
| Public Law No. 100-203, 101 Stat. 1330 (1987) | 11 |
| *Rules and Regulations* | |
| Former 43 CFR § 426.11(ii)(4) (1983) | 1 |
| 43 Code of Federal Regulations | |
| § 426.1(b) | 4 |
| § 426.11(i)(1) | 9 |
| § 426.11(i)(3) | 8 |
| § 426.11(i)(4) | 2, 8, 13 |
| *Administrative Record* | |
| 48 Federal Register 54,781 (1983) | 8 |
| *Congressional Record* | |
| 128 Congressional Record | |
| 16,298 (1982) | 7 |
| 16,426-427 (1982) | 7 |
| 132 Congressional Record | |
| H5208-13 (daily ed. July 31, 1986) | 9 |
| E2763 (daily ed. August 6, 1986) | 9 |
| S11767 (daily ed. August 13, 1986) | 9 |
| 133 Congressional Record | |
| E4995 (daily ed. Dec. 22, 1987) | 12 |
| 136 Congressional Record | |
| H3603 (June 14, 1990) | 29 |
| *United States Constitution* | |
| Art. I, § 1 | 1, 27 |
| Art. III, § 1 | 1, 27 |
| Art. III, § 2 | 1, 27 |
| U.S. Const. Amend. V | 1, 22, 25 |

TABLE OF AUTHORITIES—Continued

*Miscellaneous* Page

R. Posner, The Federal Courts: Crisis and Reform (1985) ..... 30
Financial Management Serv., U.S. Dep't of Treasury, Consolidated Financial Statements of the United States Government, Fiscal Year 1988 ..... 29
45 Cong. Q. Wkly. Rep. 3183-92 (Dec. 26, 1987) ..... 12
H.R. Rep. No. 458, 97th Cong. 2d Sess. (1982) ..... 4, 7
H.R. Rep. No. 495, 100th Cong. 2d Sess. (1987) ..... 12
General Accounting Office, Water Subsidies: Basic Changes needed to Avoid Abuse of the 960-Acre Limit (October 1989) ..... 2
United States Department of Interior, Bureau of Reclamation, 1987 Summary Statistics, Vol. I ..... 2
United States Department of Interior, San Luis Unit: A Report on the Feasibility of Water Supply Development (1955) ..... 2
Williston on Contracts 3d ed. (1961)
§ 601 ..... 17
§ 602 ..... 16, 18
§ 621 ..... 18
§ 623 ..... 17
§ 626 ..... 16
Op. Solicitor 85 Interior Dec. 297 (1978) ..... 6
Op. Solicitor M-36901 (Supp. I) (June 17, 1986) ..... 9
Restatement (Second) of Contracts (1981)
§ 202 ..... 17
§ 206 ..... 18
§ 207 ..... 15, 16, 18
Uniform Commercial Code § 2-208 ..... 17
California Water Code § 34000-38501 ..... 2
1 Public Papers (1988) ..... 12

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioners Boston Ranch Company ("Boston Ranch"), Edwin R. O'Neill ("O'Neill"), and West Haven Farming Co. ("West Haven") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

### OPINIONS BELOW

The Opinion and the Dissent, reproduced as Appendix A, are reported *sub nom. Barcellos and Wolfsen, Inc., et al. v. Westlands Water District, et al.*, at 899 F.2d 814. The Order amending the Opinion, denying the petition for rehearing, and rejecting the suggestion for rehearing *en banc* is reproduced as Appendix B. The rulings of the United States District Court for the Eastern District of California, reproduced as Appendix C, were not reported.

### JURISDICTION

The majority Opinion was filed and judgment entered on March 16, 1990. The above Order was filed on June 7, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, Section 1, Article III, Sections 1 and 2, and the Fifth Amendment due process and takings clauses of the United States Constitution are reproduced as Appendix D. Section 203(b) (first sentence), Section 209(e), and Section 205(c) of the Reclamation Reform Act of 1982, 43 U.S.C. §§ 390cc(b), 390ii(e), 390ee(c), are reproduced as Appendix G. Former Rule 11(i)(4) of respondent Department of the Interior ("Interior"), former 43 CFR § 426.11(i)(4) (1983), is reproduced as Appendix H. Section 5302 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101

Stat. 1330-268, which added Section 224(h) to the Reclamation Reform Act, 43 U.S.C. § 390ww(h), is reproduced as Appendix I. Interior's current Rule 11(i)(4)(ii), 43 CFR § 426.11(i)(4)(ii), is reproduced as Appendix J.

## STATEMENT OF THE CASE

### A. Service And Recordable Contracts

The main purpose of the federal reclamation program is to reclaim the arid regions of the 17 western states and turn them into rich farmland.[1] Interior builds dams, reservoirs, canals, drains, and distribution and drainage systems. Farmers, through water districts, contract with Interior to buy irrigation water and to repay the costs of constructing and of operating and maintaining such works. The taxpayers bear the interest costs.[2]

This case arises out of the Central Valley Project in California.[3] The water works involved comprise the San Luis Unit.[4] One of three districts served by the Unit was the original Westlands Water District.[5]

---

[1] *See Nevada v. United States*, 463 U.S. 110, 115, 128 (1983); *California v. United States*, 438 U.S. 645, 649, 650, 663 (1978).

[2] *See* U.S. Dep't of Interior, Bur. Reclamation, 1987 Summary Statistics, Vol. I at 1-8; General Accounting Off., Water Subsidies: Basic Changes Needed To Avoid Abuse Of The 960-Acre Limit (October 1989) at 8.

[3] *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-30 (1950).

[4] *See* 43 U.S.C. § 485h(a); U.S. Dep't .of Interior, San Luis Unit: A Report On The Feasibility Of Water Supply Development (1955); Pub. L. No. 86-488, 74 Stat. 156 (1960). Interior operates 238 such units. 1987 Summary Statistics, at 2.

[5] The original Westlands district, comprising about 400,000 acres, was founded in 1952. Cal. Water Code §§ 34000-38501. It was authorized to make contracts with Interior. *Id.* at §§ 35403, 35852, 35875, 35876. It was also authorized to impose charges on irrigators in order to make the payments required under such contracts. *Id.* at §§ 35423, 35470. Interior currently contracts with 611 such water districts. Water Subsidies, at 8.

Interior entered a "service" contract[6] with the Westlands district in 1963 and various "recordable" contracts[7] with landowners, including petitioners, thereafter. The majority Opinion (A19) noted that Interior contracted in "its capacity as a commercial contractor."

The 1963 contract obligates Interior to furnish each year at least 900,000 acre feet of water for use on "eligible" farm lands, including "excess" lands. It also provides that Interior will furnish drainage service to meet the drainage requirements of such lands. The 1963 contract has a 40-year term, which commenced in 1968 and runs through 2007. The Opinion (A4) acknowledges that petitioners are "beneficiaries" of the 1963 contract.

The contract contains only one price term. Article 6(a) sets out "the rate of payment" for service:

> "The rate . . . may not be in excess of Eight Dollars ($8) per acre foot and shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50)."

Article 6(a) also provides that the drainage service component shall be included in "the rate of payment" when drainage service first becomes available. Article 6(b) provides that all payments shall be made at "the rate" provided in Article 6(a). Article 3(d) of the contract requires that Interior shall furnish and the district shall pay for the water, "as provided in Article 6."

Each of Boston Ranch and West Haven filed a declaration under oath below that it "supported . . . the entry into the 1963 water service contract . . . based on the assumption that it would pay no more than $8.00 per acre foot for water and drainage service through the date of the sale of its excess lands." Interior did not dispute

---

[6] *See* 43 U.S.C. § 485h(e).

[7] *See* 43 U.S.C. § 423e.

these declarations. The primary drafter of the 1963 water service contract was Interior.[8]

A second purpose of reclamation law is to spread the benefits of the program to as many farmers as practicable. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958); H.R. Rep. No. 458, 97th Cong. 2d Sess. (1982) at 8; 43 CFR § 426.1(b). This goal is achieved by the excess land laws and, in particular, by recordable contracts between Interior and landowners providing for the sale of lands in excess of 160 acres.

Articles 23(a) and 25(b)(i) of the 1963 contract provide that each excess landowner, as a condition precedent to the right to receive water for his excess land, shall execute a recordable contract agreeing to dispose of his excess lands within ten years at a discounted price and agreeing further that if the land is not so disposed of, Interior shall have the power to dispose of it. Article 23(a) further provides that no such sale shall carry the right to receive water unless and until the terms are "approved" by Interior. As service became available, the petitioners entered into ten such recordable contracts with Interior. Each is in a form provided by Interior and is identical in language.[9]

Each recordable contract recites that it was made in "consideration" of the "benefits" to be derived under the 1963 service contract, that the service contract was "implemented" by it, and that it was made as an "inducement" to make water available for excess lands.

---

[8] As noted in the Dissent (A30 n.4), the drafter "was almost certainly the government." This is confirmed by the fact that its provisions are substantially identical to exemplary provisions in other contracts. *See, e.g., Peterson v. United States Department of the Interior*, 899 F.2d 799, 809 (9th Cir. 1990).

[9] O'Neill executed recordable contracts on June 12, 1969, January 4, 1970, and January 13, 1970 covering a total of 974 excess acres. Boston Ranch executed two such contracts on January 21, 1972 covering 23,711 acres. West Haven Farming Co. executed recordable contracts on July 7, 1973, July 20, 1973, July 28, 1973, January 25, 1974, and April 2, 1974 covering 5,566 acres.

Article 5 of each recordable contract provides that all rights of the landowner to receive water for his excess land shall be "subject to" the provisions of the 1963 contract. Article 8 of each contract provides that no excess land shall be entitled to receive water except "while owned" by the landowner. Article 9 provides that when any excess land shall have been sold to an eligible nonexcess landowner, the land shall also be "subject to and governed by" the 1963 contract.

Article 11 of each recordable contract, as originally executed, provided that the landowner appointed Interior his attorney-in-fact to sell his excess land at any time after a period of ten years. However, that period of time is expressly subject to extension under Article 13, which provides that the computation of the period "shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner."

In the late 1970's petitioners' rights under the service contract and their recordable contracts were adversely affected by two unrelated events. The first occurred in 1976 when Interior stopped approving excess land sales. This "moratorium" resulted from two court decisions against Interior unrelated to this litigation.[10] Landowners desiring to sell their excess lands were, in the words of the majority Opinion (A19), "legally precluded" from selling during the moratorium.[11] The moratorium would last until 1984.

The second event occurred in 1978 when Interior's Solicitor issued a legal opinion which created substantial doubts about certain of the water rights established by

---

[10] *National Land For People v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976); *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980).

[11] O'Neill, for instance, vigorously but unsuccessfully attempted to exercise his right to sell his excess lands after 1976.

the contracts.[12] Armed with the new opinion, Interior thereafter forced the district, by means of threats to cut off its water, to enter into new interim contracts covering the water subject to the 1963 contract. These contracts doubled the price of water. But they made no distinction between excess lands under extended contracts and other lands. One of the two underlying actions [13] was instituted in April 1979 by a group of landowners, including Boston Ranch and O'Neill. West Haven, Interior, the district, and four classes of landowners were also parties. Dismissal was denied by the court below. *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980).[14] The court broadly characterized the pleadings as "seeking a determination of the respective rights and duties of the parties under the . . . contract and Federal Reclamation Law" and as "requesting the Court to adjudicate the rights of all the parties and the United States government as they relate to water." 491 F. Supp. at 265, 267. Thereafter, the second underlying action [15] was filed, which was later consolidated with the first. The underlying actions were to remain unresolved until 1986.

---

[12] Op. Solic. 85 Interior Dec. 297 (1978). Solicitor Krulitz admitted that the 1963 contract was in effect and authorized delivery of the amount of water, "at the price" stated therein to the area authorized to receive service. *Id.* at 299, 301. However, Solicitor Krulitz opined that the eastern edge of the original Westlands area was not authorized to receive water service. The opinion further provided that the amount the district had bound itself to pay for drainage facilities was not sufficient to repay the escalated costs thereof.

[13] *Barcellos & Wolfsen, Inc., et al. v. Westlands Water District, et al.*, E.D. Cal. No. CV 79-106-EDP.

[14] In support of its motions to dismiss, the government made its position about the contract price explicit in oral argument: "Sometimes the Government makes improvident bargains, and it has to change those improvident bargains . . . ."

[15] *Westlands Water District v. United States*, E.D. Cal. No. CV F-81-245-EDP.

The ten-year anniversary dates of O'Neill's recordable contracts occurred between June 12, 1979 and January 13, 1980. The tenth anniversary date of Boston Ranch's contracts occurred on January 21, 1982. Nonetheless, the majority Opinion (A6) acknowledged: ". . . [D]uring this period, Interior provided Project water at the same rate for lands whose ten years had run as for those whose time had not run."

**B. 1982 Act And Rule 11(i)(4)**

Before either of the above controversies had been resolved, Congress enacted major reclamation reform legislation. The Reclamation Reform Act of 1982 became law on October 12, 1982. Pub. L. No. 97-293; 96 Stat. 1263; 43 U.S.C. §§ 390aa-390zz-1.

Sections 203(a) and 203(c) of the 1982 Act describe the circumstances under which the Act's "discretionary" provisions, and their higher acreage limits and higher water rates, are triggered. 43 U.S.C. §§ 390cc(a), (c). The discretionary provisions (Sections 204-208) do not apply to petitioners and other "prior law recipients," because the first sentence of Section 203(b) provides that non-electing landowners in non-amending districts "shall be subject to Federal reclamation law in effect immediately prior to the date of enactment of this Act, as that law is amended or supplemented by sections 209 through 230 of this title." 43 U.S.C. § 390cc(b).[16]

Section 209(e), which is applicable to petitioners, provides that if any owner of excess lands was prevented from disposing of them because interior had withheld approval, the period of time for the disposal of such lands "shall be extended." 43 U.S.C. § 390ii(e).

Had the discretionary provisions applied, petitioners would have been required under Section 205(c) of the Act to pay, with respect to their excess lands operated

---

[16] *See* H.R. Rep. No. 458, 97th Cong. 12-15 (1982); 128 Cong. Rec. 16,298, 16,426-27 (1982).

under extended recordable contracts, the "full cost" rate, or approximately $42.00 per acre foot, rather than the contract rate, starting 18 months after the resumption of excess land sale approvals. 43 U.S.C. § 390ee(c).

On December 6, 1983 Interior published its Rule 11(i)(4) implementing the above provisions of the 1982 Act. It read, in relevant part, as follows:

> "Land under recordable contract which is held by a water user not subject to the discretionary provisions . . . may continue to receive irrigation water at the contract water rate for the extended term of the contract . . . ." 48 Fed. Reg. 54,781 (1983) (former 43 CFR § 426.11(i)(4)).

The majority Opinion (A24) acknowledges that Rule 11(i)(4) created "reasonable expectations" on the part of petitioners that they would be able to continue purchasing water during the extended periods of their recordable contracts at the same price paid by others.

**C. Amendatory Recordable Contracts**

After Rule 11(i)(4) was adopted, Interior and various landowners executed amendatory recordable contracts.[17] In August 1984 Boston Ranch and West Haven executed seven such contracts extending their holding periods to various specific dates between 1990 and 1992.[18]

The amendatory contracts executed by Boston Ranch and West Haven were expressly "made . . . under the provisions of the Reclamation Reform Act of 1982." Each provided that in all respects, other than amending the maturity date, the original recordable contract "shall remain in full force and effect." The amendatory contracts, which are identical, were drafted by Interior.

Thereafter, as the majority Opinion acknowledges (A6), Interior continued to provide water at the same

---

[17] *See* 43 CFR § 426.11(i)(3).

[18] Because O'Neill had been attempting to sell his lands since 1976, no amendatory recordable contracts were made with respect to his excess lands.

rate for excess lands operated under extended recordable contracts as for other lands. Interior again commenced approving excess land sales on July 10, 1984.[19] Accordingly, the 18-month period of Section 205(c), had it applied to petitioners, would have expired on January 10, 1986. Even after that date, Interior continued to sell water for Boston Ranch's and West Haven's excess lands without regard to the extension of their holding periods.

**D. Stipulated Judgment**

Between mid-1984 and mid-1986 the Westlands parties and the federal parties attempted to reach a settlement of the two underlying actions. Throughout this period of negotiations Rule 11(i)(4) was in effect.

While negotiations were proceeding before the judicial branch, several related events occurred in the legislative and executive branches. On December 19, 1985 Congress passed a law requiring legislative oversight of any proposed settlement.[20] On June 17, 1986, the 1978 Interior legal opinion which had precipitated the underlying actions was rescinded.[21] And on July 13, 1986 Congressional oversight of the settlement was initiated.[22]

---

[19] 43 CFR § 426.11(i)(1).

[20] Pub. L. No. 99-190, 99 Stat. 1320.

[21] Op. Solic. M-36901 (Supp. I) (Jun. 17, 1986). The opinion of Solicitor Tarr stated: "We concur that the 1963 contract is a binding and enforceable obligation." On the service area and drainage payment issues, the Tarr opinion chose to "rescind" the Krulitz opinion.

[22] Interior submitted a proposed stipulated judgment to the Congress for formal 30-day oversight. On July 31, 1986, Congressman George Miller offered an amendment to a House appropriations bill which would have prohibited the settlement. This measure was approved by the House and sent to the Senate. 132 Cong. Rec. H5208-13 (daily ed. July 31, 1986). However, the appropriations bill passed by the Senate and enacted into law did not prohibit the settlement. Accordingly, the parties to the underlying actions were free to go forward with the judicial process. *See* 132 Cong. Rec. E2763 (daily ed. Aug. 6, 1986); *Id.* at S11767 (daily ed. Aug. 13, 1986).

On August 29, 1986 all parties to the underlying actions filed the proposed stipulated judgment. On December 30, 1986 the court, after a noticed public hearing on its fairness, adequacy and reasonableness, as required by applicable class action rules, signed and entered the judgment, which enforced the $8.00 per acre foot rate of payment in the 1963 contract.

Paragraphs 8 and 9 of the stipulated judgment provide that the United States shall reimburse water users for all water payments since 1978 in excess of the contract rate, plus interest. These refunds were to apply to all water, including water used on non-excess lands, water used on excess lands during the original ten-year term, and, as the Opinion (A11) acknowledged, "water used on excess lands . . . for the extended period."

The stipulated judgment also guarantees the 1963 contract service rate of $8.00 per acre foot in future years. Paragraph 4.1 of the stipulated judgment specifically provides, in relevant part, as follows:

> "Beginning the first day of the month after this Judgment is entered, the District and the United States shall perform the 1963 Contract; . . . . The 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service by the United States as specified therein."

The judgment made no distinction between owners of excess lands operating under extended contracts and other landowners.

The stipulated judgment contains various other provisions confirming that petitioners shall be charged the contract price. For example, paragraph 17.6 provides that they shall bear no "water service charge . . . which is greater than the price of water which the District is obligated to pay under the 1963 Contract. . . ."

Attempting to secure their rights under their preexisting contracts was not cost-free to petitioners. By virtue of still other provisions, they released various val-

uable claims and assumed various new economic burdens. In paragraphs 7.5 and 20, even though the drainage service called for in the 1963 contract had never been provided by Interior, they agreed to drop their claims for reimbursement of past payments of the drainage service component of the contract price and to continue making such payments in the future. And under paragraph 7 they and their neighbors created and agreed to contribute $100 million to a trust fund to be used to finance construction of drainage service facilities.

Each of the petitioners filed declarations in the district court that the stipulations leading to the judgment were executed "in reliance upon the fact that [he or it] would be able to buy water at the 1963 contract rate until [his or its] excess lands were sold." Interior did not contradict this sworn testimony. Indeed, the district court transmitted a notice, which had been reviewed by the government, describing the proposed settlement to absent class members. Boston Ranch and O'Neill advised them that they "will receive the water service to which they are entitled under the 1963 Contract," unless they have "elected or elect" to become subject to the discretionary provisions of the 1982 Act.

During 1987 the 1963 contract was, in fact, performed, as directed by the judgment. Petitioners received the refunds required by the judgment. Furthermore, petitioners paid $8.00 per acre foot for water service at all times from December 30, 1986 to December 22, 1987. In exchange, they bore the new financial burdens they had undertaken in the stipulated judgment.

**E. The Challenged Statute**

The Omnibus Budget Reconciliation Act of 1987 was enacted on December 22, 1987. Pub. L. No. 100-203; 101 Stat. 1330. Section 5302(a) of that Act added new Section 224(h) to the Reclamation Reform Act. 43 U.S.C. § 390ww(h). This section reads, in relevant part, as follows:

> "The provisions of Section 205(c) are and have been applicable to all recordable contracts executed

> prior to October 12, 1982, and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked; *Provided*, That . . . the Secretary shall not seek reimbursement for any amounts due under this subsection or Section 205(c) which was due prior to the date of enactment of this subsection."

Neither the House nor the Senate reconciliation bill had said anything about charging full-cost rates to prior law recipients operating under extended contracts.[23] The differences between the two versions were referred to a conference committee on December 14, 1987. 45 Cong. Q. Wkly. Rep. 3183-92 (Dec. 26, 1987). The conference report was issued on December 21, 1987. H.R. Rep. No. 495, 100th Cong. 2d Sess. (1987). This was the first time new Section 224(h) appeared. The conference report explained that excess lands under extended contracts "have already received irrigation water at less than full cost for a period of ten years." *Id.* at 786. On December 22, 1987 Congressman Miller inserted remarks in the record purporting to justify his measure as "saving taxpayers tens of millions of dollars." 133 Cong. Rec. E4995 (daily ed. Dec. 22, 1987).[24]

Pursuant to the 1987 legislation Interior adopted new Rule 11(i)(4)(ii), effective as of January 17, 1989, which reads, in relevant part, as follows:

> "For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate . . . commencing De-

---

[23] The Congressional Budget Act of 1974 establishes the procedure Congress is to follow as to budget reconciliation measures including, among other things, "revenue increases." 2 U.S.C. §§ 632(a)(2), 634(a)(2), 639, 641(a)(2), (d)(2).

[24] The Omnibus Budget Reconcilation Act of 1987 included hundreds of revenue-raising measures. It was designed to produce $9.1 billion in new revenues during the fiscal year. 45 Cong. Q. Wkly. Rep. 3190 (Dec. 26, 1987). President Reagan commented extensively on the 3,296-page package of taxing and related spending legislation during his January 25, 1988 State of the Union Address. 1 Pub. Papers 86 (1988).

cember 23, 1987, through the effective termination date of the extended recordable contract." 43 CFR § 426.11(i)(4)(ii).

**F. Motion To Enforce Judgment**

Petitioners have been forced to pay more than $42.00 per acre foot for water service since December 23, 1987, the day after the challenged statute was enacted.[25]

On March 29, 1988 petitioners moved to enforce the judgment, as provided therein. The district court denied the motion in rulings on August 10, 1988 and December 8, 1988. On January 6, 1989 petitioners appealed. The Court of Appeals for the Ninth Circuit affirmed.

The majority Opinion found (A23-24): "When the ten-year periods expired, the parties had to deal with the situation without explicit guidance from the contract. . . . [T]he contracts contained no explicit provisions governing the situation in which the parties found themselves." The majority Opinion (A25-26) further found: "Nowhere does the judgment discuss the issue of the price of water for excess lands under extended term contracts. . . . [T]he judgment does not provide for terms such as those spelled out in Interior's former rule."

The majority Opinion held (A23) that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public" and that inexplicit government contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." The Opinion appeared to conclude (A25-26) that a consent judgment against the government, if inexplicit, must also be construed in favor of the government.

As an alternative ground of decision, the majority Opinion ruled (A16, A24) that a statute abrogating

---

[25] West Haven still owns its excess lands. Between December 23, 1987 and July 31, 1990 it paid Section 224(h) surcharges aggregating $616,530. Boston Ranch sold its excess lands on May 31, 1989. Between December 23, 1987 and May 31, 1989 Boston Ranch paid surcharges aggregating $3,284,269.

government obligations is subject to "rational basis" review. The Opinion also expressed doubt (A25) that judgment rights against the government are constitutionally guaranteed to be "continuing" and "permanently" immune to legislative impairment.[26]

## REASONS FOR GRANTING THE WRIT

### I. THE MAJORITY OPINION CONFLICTS WITH DECISIONS OF THIS COURT

#### A. The Holding That Inexplicit Terms In Commercial Contracts Or Consent Judgments Against The Government Are Automatically Construed In Favor Of The Government Conflicts With Holdings Of This Court That Such Contracts And Judgments Are Interpreted In Accordance With Ordinary Canons Designed To Effectuate The Intent Of The Parties

##### 1. *The Contracts*

Having found that petitioners' contracts were insufficiently "explicit," the majority Opinion (A23) initially resolved this perceived lack of explicitness by applying the following canon of construction:

> "In a case where the government is charged by private individuals with breaching its own obligations in violation of the Constitution, '[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public.' *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 544 (1837)."

The amendment to the majority Opinion (A23 n.18) added the following footnote:

> "The *Charles River Bridge* rule is simply another way of stating that 'governmental contracts "should

---

[26] On or about March 1, 1989 Interior instituted a new suit against the district to collect the disputed surcharges. *United States v. Westlands Water District*, E.D. Cal. No. CV-F-89-172 EDP. The district counterclaimed against the government, asserted third party claims against approximately 70 affected water users, including petitioners, and interpled the disputed funds with the court. The action was stayed on May 10, 1990 pending a final outcome in the instant case. As of July 31, 1990 the total amount of surcharges, plus interest, on deposit with the court was $6,621,778.

> be construed, if possible, to avoid foreclosing exercise of sovereign authority." ' [*Peterson*, 899 F.2d at 807] (quoting *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986))."

The majority's exclusive application of this canon of construction conflicts squarely with decisions of this Court which hold that commercial contracts of the federal government are interpreted, instead, under the normal canons of contract interpretation, which look to the intention of the parties, as reflected in their course of performance, to ascertain their meaning.

The *Charles River Bridge* case involved a challenge under the contracts clause of an impairment to a statutory grant of a charter. The canon it announced has been applied by this Court in situations where the contract impaired was a statutory grant of a charter or franchise. *E.g.*, *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 666 (1878); *Larson v. South Dakota*, 278 U.S. 429, 435 (1929). *Bowen* was a takings clause case involving contracts with state agencies used to implement public employee participation in the Social Security program. The challenged statute impaired a termination provision in contracts which "exactly tracked the language" of the statute. 477 U.S. at 55. The Court found that the termination privilege in the contracts "bears little, if any, resemblance" to constitutionally protected rights in commercial contracts. *Id.* at 55. Such privilege was not a property right such as that created by "an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." *Id.*

The canon of construction applied in *Charles River Bridge* and *Bowen* applies to a narrow class of contracts of which the contracts in those two cases are illustrative. "In general, it does not prefer the interest of a governmental agency as a party to a contract; . . . ." Restatement (Second) of Contracts § 207, comment a. Furthermore, even with respect to a statutory grant or a noncommercial contract, the canon comes into play only when the effort to ascertain the intent of the parties leaves the

contract's meaning uncertain. Williston on Contracts, 3d ed. § 602 at 324; *cf., Board of Trade of San Francisco v. Swiss Credit Bank*, 597 F.2d 146, 149 (9th Cir. 1979). The canon rests on public policy, rather than the intent of the parties. Restatement, § 207, comment a; Williston § 602 at 324, § 626 at 851. Indeed, the *Bowen* version of the canon, by its own terms, construes an inexplicit contract in favor of the government only "if possible."

The rule of construction applied in *Charles River Bridge* and *Bowen* is inapplicable here for both such reasons. The contracts in the case at bar were not statutory grants of a charter or a franchise, as in *Charles River Bridge*. Nor were they non-commercial contracts creating no property rights of the type involved in *Bowen*. These were contracts for the purchase and the sale of a valuable commodity, water, made by Interior in its capacity as a commercial contractor. Second, the *Charles River Bridge-Bowen* canon of construction is not applicable here, because application of the usual principles of contract interpretation establishes without doubt what the parties' contracts were.

This Court holds that the usual canons of contract interpretation will be applied to interpret an ambiguous or inexplicit government commercial contract. The Court said in *Hollerbach v. United States*, 233 U.S. 165, 171 (1914): "A government contract should be interpreted as are contracts between individuals. . . ." To the same effect are *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925), *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944), *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947), and *United States v. Seckinger*, 397 U.S. 203, 210 (1970).

Where the words of a federal contract are unclear the Court looks first to the intent of the parties. The federal courts seek to carry into effect the "real intention" of the contractors. *Garrison v. United States*, 74 U.S. 688, 691 (1869). The interpretation of an ambiguous federal contract will depend upon the "intention of the parties".

*American Stevedores, Inc., v. Porello*, 330 U.S. 446, 456, 458 (1947); *Seckinger*, 397 U.S. at 208, 209, 211-13. Determining intention is the "primary object" of interpretation. Williston, § 601.

This Court applies the canon that what the parties intended by the language of the contract is best revealed by how they actually performed the contract. It has construed an ambiguous District of Columbia construction contract against the government in accordance with the "work as actually done" which revealed "the practical construction which the parties put upon the terms of their own contract." *District of Columbia v. Gallaher*, 124 U.S. 505, 509-10 (1888). In *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913), a case construing a municipal grant of a utility franchise, the Court said: "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." In *Atwater v. United States*, 262 U.S. 495, 498 (1923) the Court enforced an initially unenforceable federal commercial contract because "it became valid and binding to the extent that it was performed." *See also* Uniform Commercial Code § 2-208; Restatement, § 202; Williston, § 623.

The course of performance maxim is applied with particular cogency in the context of contract extensions. Where a commercial arrangement between the United States and a private party is extended beyond its original term and both parties perform thereafter in a certain way, the rights and duties during that period will be implied in accord with such performance. *United States v. Bostwick*, 94 U.S. 53, 67 (1877).

Another of the standard canons of contract interpretation is that an ambiguous or inexplicit contract is to be construed against the drafter. The canon operates even if the drafter is the government. In *Garrison*, which involved an ambiguous price term in a sales con-

tract drafted by the government, this Court held that "doubtful expressions should . . ., according to a well known rule, be construed most strongly against the party who uses the language." 74 U.S. at 690. In *Seckinger*, which involved an ambiguous government construction contract, this Court noted "the general maxim that a contract should be construed most strongly against the drafter, which in this case is the U.S." 397 U.S. at 210. *See Restatement*, §§ 206, 207, comment a; Williston, § 602 at 327, § 621.[27]

The same canons of contract interpretation apply in a constitutional case where the government seeks to legislate on subject matter covered by a pre-existing contract. In *Lynch v. United States*, 292 U.S. 571 (1934) a beneficiary of a government insurance policy issued pursuant to statute sought to recover amounts alleged to be due when the government repealed the enabling law as part of the Economy Act of 1933. The Court held that the repealing statute violated the Fifth Amendment. In reaching this conclusion, it cited several of the above contract interpretation cases for this proposition: "When the United States enters into contract relations, its rights and duties are governed generally by the law applicable to contracts between private parties." 292 U.S. at 579 n.6.[28] The *Lynch* Court also held that the terms of the policies were to be found in part in the policies, themselves, and ". . . in part in the statutes under which they are issued and the regulations promulgated thereunder." 292 U.S. at 577.

---

[27] Lower courts generally interpret reclamation contracts in accord with the usual canons. *E.g., United States v. Coachella Valley County Water District*, 111 F. Supp. 172 (S.D. Cal. 1953); *Tulelake Irrigation District v. United States*, 342 F.2d 447, 453 (Ct. Cl. 1965). Even the Ninth Circuit will apply such canons. *E.g., Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1032-33 (9th Cir. 1989); *but see Peterson*, 899 F.2d at 807.

[28] *Lynch* was later cited by the Court as authority for the following: "Normally, contracts between the United States and others are construed as contracts between private parties." *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564-65 (1946).

In *Perry v. United States*, 294 U.S. 330 (1935) the Court ruled that federal legislation invalidating gold clauses in government-issued bonds was beyond the power of Congress. The Court stated that language incorporated into the bonds had to be fairly and reasonably "construed" in order to determine whether the bondholder held the rights he claimed. The Court found that such language was, indeed, "intended" to give him such rights. 294 U.S. at 348-49.

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) the Court struck down a state statute impairing state bond obligations under the contracts clause. It stated as follows: "The obligations of a contract long have been regarded as including . . . the contemporaneous state law pertaining to interpretation and enforcement. . . . This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." 431 U.S. at 19 n.17. *See also United States v. Larionoff*, 431 U.S. 863, 869 (1977).

The contracts in the case at bar contained one, and only one, price term, $8.00 per acre foot. That was what the 1963 contract called "the rate of payment."

Boston Ranch and West Haven testified below—and their testimony was not disputed—that they supported the 1963 contract on the assumption they would "pay no more than $8.00 per acre foot . . . through the date of sale" of their excess lands.[29] When Boston Ranch and West Haven executed their amendatory recordable contracts in 1984, Rule 11(i)(4) was deemed to be a part of those contracts. The majority Opinion (A24) ac-

---

[29] The Dissent (A30 n.4) said: "If there were truly an ambiguity, I would be dubious about resolving that at our level without the development of evidence in trial court proceedings." The majority Opinion (A24 n.19) answered: "We would not ordinarily quarrel with such a suggestion, but neither party offers any parol evidence to help us interpret the documents at issue." In light of the evidence in the record, this statement is not correct.

knowledges that petitioners had "reasonable expectations" of paying the contract rate thereunder.

If there was any doubt about the intent of the parties, it was resolved by the way in which they jointly performed the contracts during the extension periods. Upon the tenth anniversary dates of the contracts, neither side altered its method of performance. Their consistent course of performance continued from June 12, 1979, when the first recordable contract entered its extended period, beyond January 10, 1986, when the 18-month grace period of Section 205(c) expired. At all times petitioners paid the same price paid by all others.

Finally, any remaining doubt would have been resolved in petitioners' favor under the principle that ambiguous or inexplicit government contracts are construed against the drafter. Here, Interior was the principal drafter of the contracts.

In summary, the majority Opinion's holding that inexplicit federal commercial contracts will be construed in a constitutional case solely in accord with a canon that the government wins simply because it is the government directly conflicts with the above decisions.

**2. *The Judgment***

The decision below raises a similar issue with respect to the proper interpretation of the stipulated judgment. The majority Opinion appears (A25-26) *sub silentio* to have eschewed application of the canons of interpretation normally used to interpret a consent judgment in favor of a special canon of construction under which the government automatically wins. The application of such canon conflicts with prior decisions of this Court.

An ambiguous or inexplicit consent judgment against the federal government "is to be construed for enforcement purposes basically as a contract." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). To similar effect are *Hughes v. United States*, 342 U.S. 353, 356 (1952), *United States v. Atlantic Refining Co.*,

360 U.S. 19, 23 (1959), and *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). In each of these cases an ambiguous provision of a consent judgment was construed against the federal government.

Where the language of a consent judgment is unclear, the Court will seek to find the interpretation which "the parties intended." *Atlantic Refining*, 360 U.S. at 24. The Court will look especially to the manner in which the parties have carried out the consent judgment. In *Atlantic Refining*, for example, the government had accepted the private party's interpretation without challenge for years. The Court, in construing the consent judgment against the government, emphasized that the interpretation advanced by the private party had been "adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start." 360 U.S. at 23-24.[30]

In the instant case, the underlying actions had been brought with a view to adjudicate the rights and duties of the parties as they relate to water under the contract and reclamation law. Throughout the negotiations leading to the judgment and at the time judgment was entered, Rule 11(i)(4) was in effect. The class notice, reviewed by the government, stated that non-electing landowners would pay the contract price. And petitioners testified below, without any contradiction, that they signed the stipulations in reliance upon the fact that they would

---

[30] The result is no different in a constitutional case where a judgment against the government is impaired by subsequent legislative action. In *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974) a statute allegedly impairing a judgment was successfully challenged on due process and separation of powers grounds. The District of Columbia Circuit rejected an argument of the government that the judgment should be construed to deny the challenger the rights she claimed. The court made its finding about what the judgment was "intended . . . to mean" without use of any special canon favoring the government. 501 F.2d at 815 n.21.

be entitled to "buy water at the 1963 contract rate until [their] lands were sold." [31]

If there was any doubt about what the parties mutually intended by their words, it was resolved by their subsequent deeds during the year after the judgment was entered. Immediately after entry, all prior payments in excess of the contract rate were refunded, with interest. From December 30, 1986 to December 22, 1987 petitioners paid, and Interior accepted, $8.00 per acre foot for thousands of acre feet of water which were delivered to their excess lands througout that period.

In short, the majority Opinion apparently construed the allegedly inexplicit stipulated judgment in accordance with a special maxim of construction under which the government prevails simply because it is the government. Decisions of this Court, on the other hand, require that any lack of explicitness in a consent decree must be interpreted in accordance with the standard canons of contract interpretation in order to establish what the parties meant.

### B. The Holding That A Revenue-Raising Statute May Abrogate A Federal Commercial Contract Or Consent Judgment Conflicts With Holdings Of This Court That Congress May Not Abrogate Such A Contract Or Judgment Under The Fifth Amendment And The Separation Of Powers Provisions Of The United States Constitution

#### 1. *The Contracts*

The majority Opinion appears to rest on the alternative ground of decision that Section 224(h) is valid under the due process and takings clauses of the Fifth Amendment [32] so long as Congress had any rational basis for adopting it. The Opinion (A16) relies upon *National*

---

[31] Again, the majority's statement (A24 n.19) that "neither party offers any parol evidence" is incorrect.

[32] "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

*Railroad Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451 (1985), which held that, where a federal statute substantially impairs a contract obligation, the "inquiry is especially limited, and the judicial scrutiny quite minimal" and the claimant must establish that Congress acted in an "irrational" way. 470 U.S. at 472.[33] The majority Opinion (A24) further ruled:

> "A legislature may repeal a statute that created non-contractual expectations as long as there is a rational basis for repeal. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980). *See also United States v. Sperry Corp.*, [110 S.Ct. 387 (1989)]. It follows a *fortiori* that a repeal of regulations under that statute is subject to no greater judicial scrutiny."[34]

The decision that a revenue-raising statute impairing a commercial contract obligation owed by the United States to a citizen is subject to rational basis review conflicts with decisions of this Court holding that such impairments are subject to heightened scrutiny.

The application of a higher standard of due process scrutiny in the context of federal obligations (as contrasted with private obligations) was first announced by this Court in *Perry*, 294 U.S. at 350-51, as follows:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . ."

On the same day, the Court decided that the same law, as applied to a private obligation, was constitutional.

---

[33] *National Railroad Passenger* involved an alleged legislative impairment of a "private" contractual right. 470 U.S. at 471.

[34] In *Fritz* this Court applied the rational basis test where social and economic legislation impaired non-contractual benefits. 449 U.S. at 174-76. In *Sperry* the rational basis test was applied to a statute which imposed a federal charge upon money owed by one non-federal party to another. 110 S. Ct. 387, 396 (1989).

*Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 309-10 (1935).

The "dual standard" announced in *Perry* was noted in *United States Trust*, 431 U.S. at 26 n.25. The Court there held that a state's impairment of its own financial obligations is unconstitutional unless it is "necessary to serve an important public purpose." *Id.* at 25. Complete deference to the legislature, said the Court, is not appropriate "because the State's self-interest is at stake." *Id.* at 26. The Court labeled its approach in such a case as "careful scrutiny." *Id* at 29 n.27.

To similar effect are *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) and *National Railroad Passenger*, 470 U.S. at 471, 472 n.24. *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Such careful judicial review has produced a long line of decisions of this Court holding that revenue-raising statutes cannot deprive one of rights under government commercial contracts.[35]

In *The Sinking Fund Cases*, 99 U.S. 700, 718-19 (1879), the Court announced the following principle:

> "The United States . . . are prohibited from depriving persons or corporations of property without due process of law. . . . The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

In *Lynch*, the Court first established that the beneficiaries of the insurance policies abrogated by the statute had constitutionally protected legal rights:

> "War Risk Insurance policies are contracts of the United States. . . . [T]he policies . . . are legal ob-

---

[35] Under reclamation law landowners own water rights, which are property rights appurtenant to their lands, to use the water beneficially. *Nevada v. United States*, 463 U.S. 110, 121-26 (1983); *Nebraska v. Wyoming*, 325 U.S. 589, 613-14 (1945); *Ickes v. Fox*, 300 U.S. 82, 84-96 (1937).

> ligations of the same dignity as other contracts of the United States and possess the same legal incidents. . . . War Risk policies, being contracts, are property and create vested rights." 292 U.S. at 576-77.

The Court then held that the repeal clause was unconstitutional, as follows:

> "The Fifth Amendment commands that property be not taken without making just compensation. . . . Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. [Citations.] . . . [T]he contracts of war risk insurance were valid when made . . . . [T]he due process clause prohibits the United States from annulling them. . . .
>
> ". . . Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." *Id.* at 579-80.

In *Perry*, the Court rejected the notions that "the Congress can disregard the obligations of the Government at its discretion" and that a federal obligation is an "illusory pledge." 294 U.S. at 350. Citing *Lynch* with approval, the Court said: ". . . [T]he Congress has not been vested with the authority to alter or destroy those obligations. . . ." *Id.* at 353-54. Finally, it said that a government obligation is:

> ". . . the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplated a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgeor. This Court has given no sanction to such a conception of the obligations of our Government." *Id.* at 351.

In *United States Trust*, the Court said:

> ". . . [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer

> to spend the money to promote the public good rather than the private welfare of its creditors . . . . [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." 431 U.S. at 29-31.

The Court also noted: "Contract rights . . . may be taken for a public purpose provided that just consideration is paid." *Id.* at 19 n.16. It further noted: "The States remain free to exercise their power of eminent domain to abrogate such contractual rights, upon payment of just compensation." *Id.* at 29 n.27. *Accord*, *Energy Reserves Group*, 459 U.S. at 412 n.14.

Finally, in *Bowen*, the Court said the federal government has the power to enter contracts that confer vested rights, and the "concomitant duty to honor those rights." 477 U.S. at 52. The Court further stated: ". . . Congress does not have the power to repudiate its own debts . . . simply in order to save money." *Id.* at 55. For both these propositions the Court cited *Lynch* and *Perry*.[36]

In summary, the majority Opinion applied the rational basis test operative where a federal statute impairs a contract between two private parties. This conflicts with this Court's decisions holding that elevated scrutiny will be undertaken where, as here, the commercial contract is between a private party and the federal government.

**2. *The Judgment***

The majority Opinion further states (A25-26) in what was also apparently an alternative ground of decision with respect to the judgment: "We doubt that even if the parties had *expressly* incorporated Interior's rule into the judgment, they would be entitled permanently to benefit from it were the law to change. 'The parties cannot,

---

[36] The Court has recognized that the *Lynch-Perry* line of cases is subject to an exception where the statute expressly reserves the power of Congress to alter, amend, or repeal it. *The Sinking Fund Cases*, 99 U.S. at 730-31; *Bowen*, 477 U.S. at 52. No such statute exists in the reclamation laws. *See* 43 U.S.C. § 469; *Ickes*, 300 U.S. at 91; *see also* 43 U.S.C. §§ 423d, 485b, 485h-2.

by giving each other consideration, purchase from a court of equity a continuing injunction. . . .' *System Federation v. Wright*, 364 U.S. 642, 651-53 (1961)." [37] This alternative basis for the decision conflicts with this Court's prior decisions under the separation of powers provisions of the Constitution,[38] which hold that private rights against the United States vested in a federal court judgment are, indeed, continuing and permanent and may not be altered or destroyed by the subsequent action of Congress.

Where private rights are at stake, this Court's examination of a Congressional attempt to control the manner in which the rights are adjudicated has been "searching." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 854 (1986). A long line of cases decided by this Court involving legislative attempts to control the outcome of government disputes confirms this principle.

In *Hayburn's Case*, 2 U.S. 409 (1792) five Justices of this Court opined that a 1792 statute was unconstitutional because it subjected federal court decisions involving federal obligations to review of Congress.

This principle was applied in the leading case of *United States v. Klein*, 80 U.S. 128, 146 (1871). The government confiscated cotton of a participant in the Confederate cause. In 1863 Congress passed a statute authorizing persons who had not given aid or comfort to the Confederacy to recover their losses. The President issued a proclamation under which one who executed an oath to that effect would have his property restored. The

---

[37] *System Federation* does not apply to the case at bar. It arose out of a dispute between two private parties. "[T]he court was not acting to enforce a promise but to enforce a statute." 364 U.S. at 653. The judgment had not been impaired by later legislation. And one party sought to modify, not enforce, it.

[38] "All legislative powers . . . shall be vested in . . . Congress. . . ." U.S. Const. Art. I, § 1. "The judicial power . . . shall be vested in [the federal courts]. . . ." *Id.* at Art. III, § 1. "The judicial power shall extend to all cases, in law and equity, arising under [federal law and] . . . to controversies to which the United States shall be a party." *Id.* at Art. III, § 2.

participant sued and won, and the government appealed. Congress thereafter inserted in an appropriations measure a provision which required dismissal of the claim. This Court invalidated the statute, saying:

> ". . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . .
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> "It is of vital importance that those powers be kept distinct . . . ." [39]

The Court has announced the same principle in numerous other cases. *E.g.*, *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 431 (1856); *Gordon v. United States*, 117 U.S. 697, 701, 703 (1865); *United States v. O'Grady's Executors*, 89 U.S. 641, 647, 648 (1875); *McCullough v. Virginia*, 172 U.S. 102, 123, 124 (1898); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).[40]

Thus, the Opinion's alternative holding that petitioners are not entitled permanently to benefit from the enforcement of a federal contract by a court judgment conflicts with this Court's decisions in the above cases.[41]

---

[39] This Court has observed that the statute in *Klein* was invalidated *inter alia* because ". . . it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980).

[40] As noted in the Dissent (A36-38), this case is not within the "exception" to the general rule applicable where the right adjudicated is "public." *Wheeling and Belmont Bridge*, 59 U.S. at 432; *Hodges*, 261 U.S. at 604, *System Federation*, 364 U.S. at 649-50.

[41] When a Congressional statute is challenged and "serious doubt" of its constitutionality exists, it is a "cardinal principle" to first determine whether an interpretation of the statute is "fairly possible" by which the issue may be avoided. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). The majority Opinion (A13-15) declined to apply this principle. The holding that the word "all" requires application of the statute to beneficiaries of the stipulated judgment conflicts with *Daylo*, 501 F.2d at 816-19; *see also Pope v. United States*, 323 U.S. 1, 9 (1944). Furthermore, the

## II. THE MAJORITY OPINION DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

Legislative breaches of obligation to enhance government revenues have reached this Court before. As the Court once observed: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *United States Trust*, 431 U.S. at 26; *see also Lynch*, 292 U.S. at 580.

Federal revenues raised by Section 224(h) will have been substantial. To date surcharges imposed in Westlands, alone, exceed six million dollars, and Westlands is only one of 611 districts performing reclamation contracts with Interior. Representative Miller assured his fellow members of Congress that his measure would add "tens of millions of dollars" to the federal coffers.[42]

Business-type operations of all types produced in fiscal year 1988 12% of federal revenues on an accrual basis, or $131 billion, of which $82 billion resulted from the sale by the government of goods and services. Financial Management Serv., U.S. Dep't of Treasury, Consolidated Financial Statements of the United States Government, Fiscal Year 1988, at 7, 12. The revenue-enhancing potential of statutes which increase the government's sale price in its commercial contracts is very significant. If the majority Opinion stands, it will send a signal to Congress that it may now utilize this potent technique in the battle to eliminate budget deficits and the national debt.

But short-term budget benefits are outweighed by long-term policy costs. The federal reclamation program is a significant on-going federal program. New contracts are being signed, existing contracts are being renewed, and non-excess landowners are buying formerly excess lands.

---

holding that the phrase "executed prior to October 12, 1982" includes contracts amended thereafter conflicts with *Larionoff*, 431 U.S. at 879.

[42] Section 224(h) was not the first such measure. *See* 43 U.S.C. § 390cc(b) (second sentence); *Peterson*, 899 F.2d 799. And it may not be the last. *See* 136 Cong. Rec. H3603 (June 14, 1990).

If Congress may raise water prices at will, these districts and landowners can be expected to become much more reluctant to enter into such transactions, at least on customary terms.

The costs to the public of upholding federal power to alter federal obligations are also important in the judicial arena. The United States becomes a party to approximately 100,000 new federal court civil suits each year. *See* R. Posner, The Federal Courts: Crisis And Reform (1985) at 63-64. The government agrees to, and the federal courts approve, numerous consent judgments. If Congress can hereafter alter such consent judgments whenever and however it sees fit in order to meet its budgetary needs, private litigants may experience a significant disincentive to settle pending litigation with the government. This could significantly increase the caseload of the Justice Department and the federal courts.

Governments need to make mutually binding contracts in order to carry out public policy. If they do not honor their old contracts, they will not be able to make new ones. "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public . . . debtors." *Lynch*, 292 U.S. at 580.

## CONCLUSION

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

*Of Counsel:*
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE
& SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
*Attorneys for Petitioners*

Dated: September 5, 1990

90-409

No.

FILED
SEP 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

BOSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
*Petitioners,*
*vs.*
UNITED STATES DEPARTMENT
OF THE INTERIOR,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI


WILLIAM M. SMILAND
*Counsel of Record*
DONNELLY, CLARK,
CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, California 90071
(213) 891-1010

*Of Counsel:*

HAL S. SCOTT
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

*Attorneys for Petitioners*



Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

**BOSTON RANCH COMPANY,**
**EDWIN R. O'NEILL,**
**WEST HAVEN FARMING CO.,**
*Petitioners,*

*vs.*

**UNITED STATES DEPARTMENT OF THE INTERIOR,**
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI


*Of Counsel:*

**HAL S. SCOTT**
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

**WILLIAM M. SMILAND**
*Counsel of Record*
**DONNELLY, CLARK, CHASE & SMILAND**
Twelfth Floor
601 West Fifth Street
Los Angeles, California 90071
(213) 891-1010

*Attorneys for Petitioners*

## TABLE OF CONTENTS

Page

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DISSENT, FILED MARCH 16, 1990, AS AMENDED JUNE 7, 1990 . . . . . A1

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AMENDING THE OPINION, DENYING THE PETITION FOR REHEARING, AND REJECTING THE SUGGESTION FOR REHEARING EN BANC, DATED JUNE 7, 1990 . . . . . B1

MEMORANDUM DECISION RE: MOTION TO ENFORCE JUDGMENT, FILED AUGUST 10, 1988 AND ORDER DENYING MOTION TO ENFORCE THE JUDGMENT OF THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED DECEMBER 8, 1988 . . . . . C1

ARTICLE I, SECTION 1, ARTICLE III, SECTIONS 1 AND 2, AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION . . . . D1

SECTION 9(e) RECLAMATION PROJECT ACT OF 1939, ch. 418, 53 Stat. 1193; 43 U.S.C. § 485h(e) . . . . . E1

**Page**

SECTION 46 OMNIBUS ADJUSTMENT ACT OF 1926, ch. 383, 44 Stat. 649; 43 U.S.C. § 423e..... F1

SECTION 203(b) (first sentence), SECTION 209(e), AND SECTION 205(c) RECLAMATION REFORM ACT OF 1982; 43 U.S.C. §§ 390cc(b) (first sentence), 390ii(e), 390ee(c)..... G1

FORMER INTERIOR RULE 11(i)(4) (1983); FORMER 43 CFR § 426.11 (i)(4) (1983)..... H1

SECTION 5302 OMNIBUS BUDGET RECONCILIATION ACT OF 1987, adding *inter alia* § 224(h), RECLAMATION REFORM ACT; 43 U.S.C. § 390ww(h)..... I1

CURRENT INTERIOR RULE 11(i)(4) (1989); 43 CFR 426.11(i)(4) (1989)..... J1

SELECTED EXCERPTS OF JUNE 5, 1963 CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE..... K1

EXEMPLAR OF RECORDABLE CONTRACT..... L1

EXEMPLAR OF AMENDATORY RECORDABLE CONTRACT..... M1

Page

SELECTED PARAGRAPHS OF DECEMBER 30, 1986 JUDGMENT ENTERED IN *BARCELLOS AND WOLFSEN, INC., et al., v. WEST-LANDS WATER DISTRICT, et al.*, E.D. Cal. No. CV 79-106-EDP . . . . . N1

# APPENDIX A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARCELLOS AND WOLFSEN, INC., et al.,

*Plaintiffs,*

and

BOSTON RANCH COMPANY; EDWIN R. O'NEILL; WEST HAVEN FARMING CO.,

*Plaintiffs-Appellants,*

v.

WESTLANDS WATER DISTRICT, et al.,

*Defendants,*

and

UNITED STATES DEPARTMENT OF INTERIOR,

*Defendant-Appellee.*

No. 89-15098

D.C. No. CV-79-0106-EDP

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted
October 4, 1989—San Francisco, California

Filed March 16, 1990
Amended June 7, 1990

Before: Betty B. Fletcher, Warren J. Ferguson and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fletcher; Dissent by Judge Fernandez

## COUNSEL

William M. Smiland, Donnelly, Clark, Chase & Smiland, Los Angeles, California, for the plaintiffs-appellants.

Robert L. Klarquist, United States Department of Justice, Washington, D.C., for the defendant-appellee.

## OPINION

FLETCHER, Circuit Judge:

Boston Ranch Company, Edwin R. O'Neill, and West Haven Farming Company appeal the district court's denial of their motion to order the Department of Interior to sell water to them at a certain price pursuant to a contract incorporated

into a consent judgment. They argue that § 224(h) of the Reclamation Reform Act of 1982, 43 U.S.C. § 390ww(h), if applied to them, impairs their contract rights and interferes with the consent judgment in violation of due process and the separation of powers required by the Constitution. We affirm the district court.

## FACTUAL AND STATUTORY BACKGROUND

This appeal turns on the interpretation of contracts made and a judgment rendered under the aegis of the Reclamation Act of 1902, 32 Stat. 388, and subsequent statutes amending it. The purpose of the original 1902 Act was to encourage people to Go West, not to engage in big-time speculation, *see Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 297 (1958), but to grow crops on modest family farms in the country's drier regions so that the nation's agricultural bounty would increase. The Act promoted the farming of lands in the arid West by creating a system under which the federal government would provide funds to build water projects from which water would be sold at a subsidized price. The Interior Department was directed to charge water users prices that would recapture the cost of building the project exclusive of interest. 43 U.S.C. § 461. The original 1902 Act allowed this subsidized water to be sold only to resident farmers and only for parcels of land no larger than 160 acres. 43 U.S.C. § 431. But the strict restriction against larger farms inhibited Congress' goal of increasing agricultural production. In 1926 Congress amended the Act to allow Interior to sell water for larger tracts, but only if the owner promised to divest himself of the lands in excess of 160 acres on terms to be worked out by Interior. 43 U.S.C. § 423e.

The appellants are landowners. Each owns more than one thousand acres of farm land in California's Central Valley. They buy water from the Westlands Water District (the District). The District and the Department of Interior (Interior) entered into a contract in 1963 (the 1963 Contract), under

which the District bought water at a subsidized rate of $8.00 per acre foot (including a $0.50 drainage service component) from a federal reclamation project (the Project) for resale under certain conditions to subscribers within the District. As subscribers, the appellants are beneficiaries of the 1963 Contract, even though they are not parties to it.

The 1963 contract prohibits the District from furnishing Project water to an owner who wishes to use the water to irrigate his "excess lands," or lands in excess of 160 acres,[1] unless the owner agrees in a separate, recordable contract with Interior to certain significant restraints on his rights to the excess lands.Each appellant entered into at least one such recordable contract with Interior between 1969 and 1974.[2] The appellants' recordable contracts are identical except for the description of the owner's particular excess lands.

Article 5 of the recordable contracts provides:

> All rights of the Landowner to receive Project Water for its excess lands shall be subject to the provisions of the District Contract and this contract.

Article 25(b)(i) of the District Contract states that as a condition precedent to the right to receive Project water, the landowner shall

> [agree] to dispose of his land . . . to persons who can take title thereto as nonexcess land . . . within a period ten (10) years after the date of the execution of said recordable contract and agree[ ] further that

[1]320 acres for a husband and wife owning land jointly.

[2]Appellant Boston Ranch executed two recordable contracts in 1972, covering 23,711 acres of excess lands. Appellant O'Neill executed three recordable contracts in 1969 and 1970, covering 974 excess acres. Appellant West Haven Farming Co. executed five recordable contracts in 1973 and 1974, covering 5,556 excess acres.

> if said land is not so disposed of within . . . ten years, the Secretary [of Interior] shall have the power to dispose of said land . . . on behalf of such large landowner.

The District contract and the recordable contracts provide not only that the landowner must sell his excess land within ten years, but also that he must sell at an artificially low appraised price—artificially low because the appraiser may not take into account the fact that the owner of the land has access to water from the Project. Furthermore, the landowner may not sell his excess lands without Interior's approval.

Although the contracts give the landowner a ten-year period during which he may transfer his excess lands without being subject to the Secretary of Interior's power of attorney over the lands, Article 13 of the recordable contracts provides:

> the computation of the ten-year period . . . shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner.

Article 13 is potentially important to this dispute, because during the ten-year term of the several recordable contracts at issue, events intervened to prevent the contracts from being performed according to the original design.

In 1976, a federal district court issued an injunction against the Department of Interior, prohibiting it from approving excess land sales pursuant to recordable contracts until Interior promulgated, in accordance with the Administrative Procedure Act, rules governing the criteria and procedures for approving such sales. *National Land for People v. Bureau of Reclamation*, 417 F.Supp. 449 (D.D.C. 1976). While the injunction was in effect, from 1976 to 1982, the appellants

were not permitted to sell their excess lands in the manner envisioned by the recordable contracts. However, only one appellant, O'Neill, attempted to sell.[3]

With regard to those excess lands governed by recordable contracts executed prior to 1972, the ten-year period in which to sell expired at some time during the period the injunction was in effect. Nonetheless, during this period, Interior provided Project water at the same rate for lands whose ten years had run as for those whose time had not run. It is disputed whether the contracts required this treatment or whether Interior was simply attempting to act equitably in light of a circumstance (the injunction) unforeseeable at the time it entered into the various contracts with the District and the landowners.

The landowners argue that Article 13 must be construed to toll the ten-year period for disposing of land, because Interior's approving excess land sales is a "service." They also argue that if the injunction tolled the ten-year period for disposing of their excess lands, it also provided them with extra time to receive water from the Project at a subsidized price. They point to Article 8 of the recordable contracts, which provides:

> None of the excess land ... shall be entitled to receive water nor shall service be made available to such land pursuant to the District Contract, except while owned by the Landowner, unless the same shall have been sold to a person who [would be] qualified as a nonexcess landowner to receive Project water ...

Appellants argue that Article 8 must be construed to mean that as long as a landowner owns excess lands under recordable contract, he is entitled to receive subsidized Project

[3]O'Neill filed a separate lawsuit concerning his right to sell.

water for those lands. The merits of these arguments are discussed elsewhere.

In 1978, the Solicitor of the Interior Department, Leo Krulitz, issued a legal opinion stating that the $8.00 rate specified in the 1963 Contract was inadequate to recover the escalating costs of the Project and was therefore contrary to the federal reclamation laws, *see* 43 U.S.C. § 461, and not binding. Op. Solic. 85 Interior Dec. 297 (1978). The Krulitz opinion did not address the question of whether excess lands under recordable contracts for more than ten years should receive Project water at the same price as other land or whether they should receive Project water at all. As a result of the Krulitz opinion, the Interior Department began to charge the District between $13.30 and $16.40 per acre foot for all Project water.

In 1979 the appellants sued the District in state court, seeking among other things to have the $8.00 rate enforced. The District joined the United States as a party and removed the action to United States District Court for the Eastern District of California. While the parties were litigating this action, a number of changes in the law occurred.

In 1982, partly as a result of the injunction against Interior concerning excess land sales, Congress passed the Reclamation Reform Act of 1982 (RRA), 43 U.S.C. §§ 390aa et seq., which comprehensively revised reclamation law. The RRA explicitly required Interior to establish rules for disposing of excess lands over which it had a power of attorney, RRA § 209(d), 43 U.S.C. § 390ii(d), and it thus superseded the injunction.

The RRA created a new regime of benefits and burdens for excess landowners that would apply to all contracts between Interior and water districts entered into or amended after the date of enactment.[4] It also provided for a transition regime,

[4]It is undisputed that the stipulated judgment is not an amended contract for the purposes of the Act.

allowing districts and landowners already parties to contracts with Interior to operate in substantially the same manner as they had under the prior law but with some changes. Section 203(b), 43 U.S.C. § 390cc(b), provided that districts with such existing contracts would be "subject to federal reclamation law in effect immediately prior to the date of enactment of this Act, as that law is amended or supplemented by sections 209 through 230 of this title." Under this transition regime, the landowner would be entitled to receive water at the price provided in the pre-existing contract. Section 203(c), 43 U.S.C. § 390cc(b), allowed a landowner with a pre-existing contract to elect to be treated under the new regime rather than the transition regime. The new regime increased from 160 to 960 acres the amount of land not subject to the burdens imposed on "excess lands," but at the same time it increased the price of water, requiring that water for excess lands (those in excess of 960 acres) be sold at "full cost."[5] These higher excess land limits and provisions for full cost pricing were set forth in §§ 203-208 of the Act, 43 U.S.C. §§ 390cc-390hh, and are sometimes referred to as the "discretionary provisions" of the Act because any recipient may choose to come under them.

Section 209(e) of the Act, 43 U.S.C. § 390ii(e), governed the effect of the 1976 injunction on pre-existing recordable contracts. It provided that the period of time provided in the contracts for the landowner to dispose of excess lands would "be extended from the date on which the Secretary again commences the processing . . . of the disposition of such lands for a period equal to the remaining period of time under the recordable contract for the disposal thereof by the owner at the time [of the injunction]." Section 209(e) did not specify whether the price of water during the extended period would be the old contract rate or the full cost rate.

[5]The full cost price is calculated to recapture interest on the government's construction costs.

Section 205(c) of the Act, 43 U.S.C. § 390ee(c) provided:

> Notwithstanding any extension of time of any recordable contract as provided in section 209(e) of this title, lands under recordable contract shall be eligible to receive irrigation water at less than full cost for a period not to exceed ten years from the date such recordable contract was executed by the Secretary in the case of contracts existing prior to the date of enactment of this Act . . . Provided, That in no case shall the right to receive water at less than full cost under this subsection terminate sooner than eighteen months after the date on which the Secretary again commences the processing or the approval of the disposition of such lands.

Because § 203(b) provided that water recipients with pre-existing contracts were subject to prior law as supplemented by §§ 209-230, but did not provide explicitly that they were subject *exclusively* to those provisions, it was unclear whether § 205 applied to those recipients.

In May of 1983, shortly after the Act was passed, Interior issued a proposed regulation providing that § 205 did apply to prior law recipients and was thus part of the transition regime.[6] 48 Fed. Reg. 19911, 19913 (May 3, 1983). But in

---

[6]In its entirety, the proposed rule provided:

> A landowner who has land under an extended recordable contract may continue to receive irrigation water for that land at the contract water rate for the full term of the original contract. However, the landowner must pay the full cost rate during the entire extended contract period unless the contract lapsed during the moratorium [i.e. the injunction] or matured within eighteen months of the date the moratotium was lifted. If the maturity date under the original contract lapsed during a moratorium or if the original contract matures within eighteen months of the date a moratorium was lifted, the landowner may receive irrigation

December of 1983, Interior changed its position and issued Final Rule 11(i)(4) providing:

> Land under recordable contract which is held by a water user not subject to the discretionary provisions may continue to receive irrigation water at the contract water rate for the extended term of the contract . . . .

48 Fed. Reg. 54,781 (former 43 C.F.R. § 426.11(i)(4)).

In 1984, the appellants' recordable contracts were amended in accordance with § 209(e) to extend the period of time for disposing of their excess lands.[7] The contracts were *not* amended to reflect the provision in Interior's Final Rule 11(i)(4) that the price of water would remain at the same contract rate during the extended period.

Meanwhile, negotiations for a settlement of the underlying 1979 lawsuit were proceeding apace. Congress was interested in the outcome of the lawsuit, and on December 19, 1985 passed section 122 of an appropriations bill, Public Law 99-190, which provided:

> None of the funds made available by this or any other Act for fiscal year 1986 to the Office of the Secretary, Department of Interior, shall be expended to

---

water at the contract rate for no more than eighteen months after the processing of excess land resumes. Thereafter the landowner must pay the full cost of the irrigation water delivered during the extension period.

48 Fed. Reg. at 19913.

[7]The contracts were extended by approximately eight years, the length of time of the moratorium on excess land sales.

Mr. O'Neill's contract had not been so amended because he was in the process of disposing of his excess lands.

> submit to the United States District Court for Eastern California any settlement with respect to Westlands Water District v. United States, et. al. . . . until (1) April 15, 1986, and (2) until the Congress has received from the Secretary and reviewed for a period of 30 days a copy of the proposed settlement agreement which has been approved and signed by the Secretary.

In June of 1986, Interior Solicitor Ralph W. Tarr rescinded the 1978 Krulitz opinion.

On July 24, 1986, the parties agreed to a stipulated judgment in the underlying action. Pursuant to P.L. 99-190, § 122, the Secretary submitted the settlement to Congress. The Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs, chaired by Congressman George Miller, held public hearings. Congressman Miller proposed an amendment to an appropriations bill which would have prohibited the settlement, and the amendment passed the House on July 31, 1986. However, the appropriations bill passed by the Senate and enacted into law did not contain the Miller amendment. The thirty days provided in § 122 elapsed.

On August 29, 1986 the court entered a stipulated judgment. For our purposes, two aspects of the judgment are relevant. First, the judgment provided for refunds to landowners of all water payments in excess of the $8.00 contract rate made since the time of the Krulitz opinion, including, as per Final Rule 11(i)(4), payments in excess of the $8.00 rate for water used on excess lands controlled by the landowners for the extended period provided in § 209(e) of the Act. Second, the judgment provided that "[t]he 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service as specified therein," and further provided that "the United States

shall perform the 1963 Contract[.]" The judgment was not appealed.

In December of 1987, Congress amended the RRA by enacting a new section 224(h), 43 U.S.C. § 390ww(h) which provided:

> The provisions of section 205(c) are and have been applicable to all recordable contracts executed prior to October 12, 1982 [the date of enactment of the RRA], and any decision, rule, or regulation promulgated by the Department of Interior to the contrary is hereby revoked: Provided, That . . . the Secretary shall not seek reimbursement for any amount due under this subsection or section 205(c) which was due prior to the date of enactment of this subsection.

On June 10, 1988 Interior published Proposed Rule 11(i)(4)(ii) to implement § 224(h) and overrule the old 11(i)(4). 53 Fed. Reg. 21,857 (1988). On January 17, 1989, the proposed rule became Final Rule 11(i)(4)(ii), which provides:

> For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate . . . commencing December 23, 1987, through the effective termination date of the extended recordable contract.

43 C.F.R. § 426.11(i)(4)(ii).

Shortly after § 224(h) was enacted, the appellants brought a motion in the district court to enforce the judgment. They argued that the judgment, in requiring the United States to perform the contract, required Interior to sell water for excess lands under extended-time contracts at the rate of $8.00 per acre foot rather than at the full cost rate of approximately $42.00 that would be required by § 224(h). The motion was essentially one for specific performance of the contract in

accordance with the appellants' understanding of the contract. The appellants did not seek compensation for breach of contract. They argued that § 224(h) did not apply to them. In the alternative, they argued that if § 224(h) did apply, it impaired the contract and interfered with the judgment and thus violated due process and the separation of powers required by the Constitution.

The court denied the motion in a conclusory manner, without explanation as to how it interpreted the judgment, the underlying contracts, or the applicable statutes. Since all of these interpretative questions are ones of law reviewable *de novo*, *L.K. Comstock & Co. v. United Engineers and Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989)(contract interpretation); *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (interpretation of consent decree); *Vance v. Hegstrom*, 793 F.2d 1018, 1022 (9th Cir. 1986)(statutory interpretation), we decide the issues without remanding.

## DISCUSSION

### A. *The Applicability of § 224(h)*

The appellants' initial argument is that § 224(h) does not apply to them. They offer two theories for why this is so.

First, they argue that because their recordable contracts were amended after October 12, 1982 to conform to the requirements of § 209(e) of the Act,[8] they were not "executed" prior to that date. And, the argument continues, § 224(h) provides that § 205(c) is applicable only to recordable contracts "executed prior to October 12, 1982." This argument has a fundamental flaw. To read the phrase "executed prior to October 12, 1982" to mean "executed prior to October 12, 1982 but not amended after October 12, 1982" would be to

[8]This argument would not help appellant O'Neill, who did not enter into an amended recordable contract.

render the clause in § 224(h) following that phrase meaningless.[9] That clause states, "and any decision, rule, or regulation to the contrary promulgated by the Department of Interior to the contrary is hereby revoked." The only decision, rule or regulation to the contrary, former 43 C.F.R. § 426.11(i)(4), provided that "land under a recordable contract not subject to the discretionary provisions may continue to receive water at the contract water rate for the *extended term* of the contract." (Emphasis added.) That extended term derives from § 209(e), and it was pursuant to a regulation that implemented § 209(e) that the recordable contracts were amended to incorporate the extended term. *See* 43 C.F.R. § 426.11(i)(3). These amendments could only have been made, of course, after the October 12, 1982 date of the RRA's enactment. Thus, to read § 224(h) the way the appellants do would impute to Congress an intent to exempt from a statute that revokes a given regulation those persons who had been virtually the only ones to whom the revoked regulation applied. We do not impute to Congress an intent to engage in an exercise in futility.[10]

[1] The appellants' second argument why § 224(h) does not apply to them is specious. They argue that since Congress was aware of the Westlands controversy (having been presented in a previous session with the opportunity to scuttle the 1986 Westlands settlement), the fact that the Westlands Water District was not mentioned by name in § 224(h) implies that

[9]This reading would also do violence to the plain language of § 224(h), which does not distinguish between those contracts amended after their initial execution and those not so amended.

[10]The legislative history of § 224(h) supports our conclusion. The conference report stated that the reason for enacting § 224(h) was that lands subject to recordable contracts executed prior to October 12, 1982 "have already received irrigation water for ten years regardless of any extension or suspension of the contract for purposes of disposal of excess lands." H.R. Conf. Rep. No. 495, 100th Cong., 2d Sess. 786. Those extensions or suspensions were embodied in the very amendments that the appellants claim exempt them from § 224(h).

Congress intended to exempt landowners in the Westlands District. Section 224(h) provides explicitly that § 205(c) is applicable to "all" recordable contracts, not all except those that Congress had reason to be aware of, and not, as the dissent argues, all except those incorporated into judgments. Section 224(h) clearly applies to the appellants.

At oral argument, counsel for the appellants conceded that interpreting § 224(h) to exempt his clients was "stretching it." Appellants nonetheless rely on the canon that if a certain reading of a statute raises "serious" constitutional questions, a court should stretch to find a "fairly possible" alternative construction that will avoid the questions. *See Johnson v. Robison,* 415 U.S. 361, 366-67 (1974). This canon has its limits; the court need not play the role of contortionist. There is no fairly debatable construction of § 224(h) that would exempt the appellants from its provisions. Moreover, for reasons discussed below, we do not believe that the constitutional questions the appellants raise are sufficiently serious to warrant invoking the canon in any event.

B. *The Due Process/ Impairment of Contract Issue*

Appellants argue that § 224(h) as applied to them deprives them of property without due process in violation of the fifth amendment by impairing the recordable contracts and the District's contract with Interior.

The fifth amendment prohibits the federal government from depriving a person of "property without due process of law." In *Lynch v. United States,* 292 U.S. 571, 579 (1934), the Supreme Court held that "[r]ights against the United States arising out of a contract with it" are property rights protected from deprivation or impairment by the fifth amendment.[11]

[11]The Contract Clause of article I, § 10 prohibits states from impairing contracts; the fifth amendment's prohibition against federal impairments is not necessarily coextensive. *See Pension Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 732-33 (1984).

In impairment of contract and due process cases involving contracts, two somewhat different kinds of contracts have been held to create contract rights protected by the constitution. In addition to traditional contracts, assented to in some formal way by both parties, *see Lynch,* statutes themselves have been treated as contracts, "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 17, n.13 (1977). *See also Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 104-05 (1938). The appellants do not claim that the 1982 Act and regulations promulgated thereunder constitute a "contract" impaired in 1987 by the passage of § 224(h). They claim only that the District Contract and the recordable contracts, of their own force, gave them rights that Congress allegedly took away in enacting § 224(h).

To prevail in their claim that § 224(h) deprived them of their contract right to water at $8.00 per acre foot for excess lands receiving water for more than ten years, the appellants must first, of course, demonstrate that they *had* such a contract right before the enactment of § 224(h). *See National R. Passenger Corp. v. A.T. & S.F.R. Co.,* 470 U.S. 451 (1985). If they can demonstrate they had such a right, they must then show a substantial impairment of that right. *See id.* If no substantial impairment is shown, the inquiry ends. *See id.* In this case, the inquiry ends after the first step. The appellants cannot demonstrate that the right they claim is a right they are entitled to by contract.

The appellants make the remarkable argument that, regardless of the reason for the landowner's failure to sell, he is entitled to subsidized water for as long as he owns his lands. They argue that Article 8 of the recordable contracts compels this conclusion. Article 8 provides:

> None of the excess land ... shall be entitled to receive water nor shall service be made available to

> such land pursuant to the District Contract, except while owned by the Landowner, unless the same shall have been sold to a person who [would be] qualified as a nonexcess landowner to receive Project water . . .

Appellants argue that the statement, "None of the excess land . . . shall be entitled to receive water . . . except while owned by the Landowner" is logically equivalent to the statement, "While excess land is owned by the Landowner, he shall be entitled to receive water." We find this argument unpersuasive. The former statement plainly means that it is a *necessary* condition for land to receive water that it be owned by the Landowner who executed the recordable contract. The landowners assert that it is a *sufficient* condition. Appellants have offered no evidence to support their interpretation; the plain language of the contract is otherwise and accordingly controls. We therefore reject the appellants' argument that under Article 8, the landowner's mere ownership of excess lands entitles him to Project water.

Thus far, we have determined only that Article 8 does not answer the question of what rights, if any, are given by the contracts to a landowner whose ten years has expired. Unfortunately, no other provision of the contracts unequivocally answers the question. Article 25 of the District Contract comes closest. It provides:

> (b) Each large landowner as a . . . condition precedent to the right to receive water made available pursuant to this contract for any of his excess lands shall:
>
> (i) Before any water is furnished by the District to his excess land, execute a valid recordable contract, agreeing . . . to dispose of his excess land . . . to persons who can take title thereto as nonexcess land . . . at a price not to exceed the approved, appraised

> value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract[,] and agreeing further that if said land is not so disposed of within ten (10) years, the Secretary shall have the power to dispose of said land at the appraised value . . . on behalf of such large landowner.

The Article makes a landowner's entering into a recordable contract, wherein he agrees to dispose of his excess lands within ten years, a condition precedent to his right to receive water pursuant to the contract. Appellants would have us read the Article as providing that in order to receive water, a landowner need only execute the contract and need not thereafter take the action required by the contract in order to continue receiving water. We reject such a wooden reading for two reasons. First, it is unlikely that the parties intended or expected that the landowners would make promises and not attempt to perform them. Thus, although the condition precedent to receiving Project water is phrased in terms of the landowner's "agreeing" to dispose of his excess lands within ten years, his failure to abide the agreement should be considered a breach of the condition in order to give the agreement life. Second, it is doubtful that Interior's right to a power of attorney was intended to be its *exclusive* remedy. The landowner's failure to sell as required by the contract should relieve Interior of the obligation to provide water. If it were otherwise, there would be little or no incentive for the landowner to sell within the prescribed period. The contract provides that the excess lands must be sold at a price determined by appraisers according to a formula that discounts the true market value of the lands by excluding the value of the water rights. The landowner would thus have much to gain by delay (continued cheap water) and little to lose (at most the right to choose the identity of the person who would receive his lands). Contract obligations ordinarily are mutual. There is no reason to read this contract as an exception.

Although the District Contract and recordable contracts do not entitle a landowner to receive water for more than ten years if he *chooses* not to sell his excess lands within that time, it does not necessarily follow that a landowner who is *legally precluded* from selling his land in the manner provided by the contracts should be deprived of Project water for an extended time. As a result of the injunction against Interior owing to its failure to comply with the APA, the appellants here were legally precluded from selling their lands when their respective ten-year periods expired. We need not decide whether Interior's non-compliance with the APA in its capacity as an administrative agency should be chargeable to Interior in its capacity as a commercial contractor and thus be considered a breach of the water contracts.[12] For even if Interior "breached" the District Contract and recordable contracts by failing to comply with the APA, it does not follow that Interior is constitutionally compelled to provide the landowners with the particular remedy they desire—eight dollar water for as long as they own their lands.

[2] The landowners in this suit seek *specific performance* of a contract that they argue entitles them to subsidized water for as long as they own their lands. They do not seek compensatory damages resulting from Interior's failure to process excess land sales. If they were seeking such damages, relief would be limited to losses they suffered as a result of not having the opportunity to sell their land less the gains they reaped from receiving $8.00 water for a period far longer than they originally could have expected.[13] The question we face is thus

---

[12] *See Horowitz v. United States*, 267 U.S. 458, 461 (1925) (noting that "United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.")

[13] The landowners received water at the $8.00 rate for far more than ten years, because Congress (and Interior) provided that there would be no interruption of subsidized water while the moratorium on excess land sales was in effect and for an additional eighteen months following the morato-

quite narrow: whether the appellants have a constitutionally-protected *contract right* to the particular remedy they seek.

The appellants argue that Article 13 of the recordable contracts entitles them to water at the contract rate for more than ten years. Article 13 provides for a tolling of the ten year period to sell excess lands if "water or service from the Project" becomes unavailable during that time. The appellants argue that "service" refers to the service of approving excess land sales and that they are thus entitled *by the contract* to additional time in which to dispose of their lands. Their interpretation of the word "service" is unsupportable,[14] but even if we accept their interpretation, Article 13 does not entitle them to subsidized water.[15] The appellants need to

---

rium. *See* RRA §§ 205(c), 224(h). The appellants have thus received subsidized water for from 13 to 18 years, depending on when they executed their recordable contracts. We note further that two of the appellants, Boston Ranch and Westhaven Farming, never even attempted to sell their excess lands. The third appellant, O'Neill did try to sell and subsequently brought a successful suit in the Court of Claims for compensatory damages.

[14]The interpretation is unsupportable for at least two reasons. First, even if approving of land sales is a "service," it certainly does not come "from the Project," and it is thus not the kind of service envisioned by Article 13. Second, throughout the documents defining the relationship among the landowners, the District, and Interior, "service" appears in contexts where it clearly refers to the service of distributing water and providing drainage facilities to recipients.

[15]Section 209(e) of the RRA has the same effect on the contracts as the appellants' reading of the word "service," and pursuant to § 209(e), the recordable contracts were amended to provide the appellants with extra time to dispose of their lands prior to the maturity of the Secretary's right to invoke a power of attorney. The contracts were not, however, amended to reflect former Interior Rule 11(i)(4) providing for low cost water pricing.

Section 209(e) raises an interpretative problem similar to the problem posed by Article 13: does it by implication provide additional time to receive subsidized water?

It is ironic that the dissent, while purporting to find a plausible reading of § 224(h) that would avoid constitutional questions, neglects to apply this

show more than just their entitlement to own the excess lands for more than ten years free of the Secretary's power of attorney; they need to show their entitlement to Project water under the terms of the contract during that time.

Article 13, when properly construed, perhaps at most implicitly provides for the converse relationship between extended ownership and extended water rights. If a landowner were actually to suffer from a cut off of *water* through no fault of his own, it is arguable that he would be entitled to hold onto his lands for a long enough time to receive the benefit that Article 13 seems intended to confer.

The primary benefit that the landowners receive from the federal reclamation program is the privilege of receiving subsidized water. Having to sell their excess lands within a limited period of time at an artificially low appraised price is an intended burden.

When Congress passed the Reclamation Act of 1902, it had two goals—to encourage family farming on modest-sized parcels and to increase agricultural output by subsidizing the irrigation of formerly arid and unproductive lands. *See Ivanhoe Irrig. Dist. v. McCracken*, 375 U.S. 275 (1958); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976). Because the 1902 Act's attempt to advance the first goal by strictly limiting access to subsidized water to those who owned fewer than 160 acres proved to interfere too much with the second goal, Congress adjusted the balance by amending the Act to authorize Interior to allow larger opera-

---

principle to § 209(e), which is far more ambiguous than § 224(h). Section 209(e) was interpreted two different ways by Interior while the agency was making rules under the RRA,,and Congress has seen fit to pass an amendment clarifying its meaning. Although the dissent is correct that it would be "parlous" to give controlling weight to declarations of one Congress' intent by a subsequent Congress, it is not parlous to find Congress' subsequent interpretation *relevant* to the question whether the previous Congress' provision was ambiguous.

tors to receive water in exchange for their promise to divest themselves of excess lands. *See* 43 U.S.C. § 423e.

Against this backdrop, Article 13's guarantee to the landowner of subsidized water for the period of time during which he lost that right makes good sense, since the essential benefit to the landowner provided by the contract (and the Act) is cheap water for the specified period of time. It does not follow that in exchange for the temporary loss of the right to sell their excess lands at an artificially low price, the landowners should receive the right to additional years of cheap water. The statutory and contractual scheme suggest that the right to subsidized water is likely to be more valuable than the right to sell lands; otherwise there would be no need to coerce the landowner to sell at the end of ten years—he would do it right away.

Other than Article 13, the only contractual provision that the appellants rely on to link ownership with entitlement to subsidized water is Article 8, which we concluded did not so entitle landowners.[16]

[3] We have found no provision in either the District Contract or the recordable contracts that provides that the right to receive water on excess lands for more than ten years fol-

[16]The dissent argues that Paragraph 17.6 of the Judgment provides the missing link between ownership of and entitlement to subsidized water. But the dissent places too much emphasis on Paragraph 17.6. It provides: "[T]he District shall not charge any water user more for water service or Drainage Service than the charges required to be paid to the United States for such service, plus any [overhead expenses]." The dissent apparently assumes that "the charges required to be paid to the United States" means the contract rate of $8.00. But Paragraph 17.6 states only that the District must charge the users the legally applicable rate and not attempt to profit from its position as the "middleman." The question we face in this appeal is what the legally applicable rate *is* for users who have received subsidized water for more than ten years. The dissent, in assuming that rate must be the $8.00 contract rate, begs this question.

lows from the right to own them for more than ten years. As we have explained, the very structure of the statutory and contractual scheme suggests otherwise.

The landowners' argument that the contracts give them the right to subsidized water for more than ten years thus finds no support either in the language or in the underlying purpose of the contracts. We agree with Interior that the 1963 Contract simply does not provide for the unforeseen situation presented by the injunction against the approval of excess land sales. When the ten-year periods expired, the parties had to deal with the situation without explicit guidance from the contract.[17]

In a case where the government is charged by private individuals with breaching its own obligations in violation of the Constitution, "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public." *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 544 (1837).[18] Because it was an unforeseen event—the injunction—that prevented the contracts in this case from being performed as planned by either party to them, it is not surprising that the

---

[17]The dissent seems to assume that that Interior bears the burden of proving that the contract does *not* entitle the landowners to more than ten years of subsidized water. But as challengers to a congressional act, it is the landowners who must prove the existence of the contract right they claim the act has impaired. *National R. Passenger Corp.*, 470 U.S. at 472.

[18]In *Lynch*, 292 U.S. at 579, the Court held that "when the United States enters into contract relations, its rights and duties are governed generally by the law applicable to private individuals." The law applied is federal law, *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947), which includes the *Charles River Bridge* canon quoted in the text.

The *Charles River Bridge* rule is simply another way of stating that "governmental contracts 'should be construed, if possible, to avoid foreclosing exercise of sovereign authority.' " *Peterson v. Dept. of Interior*, No. 87-2681, slip op. 2761, 2783 (9th Cir. March 14, 1990)(quoting *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)).

contracts contained no explicit provisions governing the situation in which the parties found themselves.[19]

[4] Although we hold that the District contract and the appellants' recordable contracts did not give them any *contractual right* to receive more than ten years of subsidized water, we do not, however, imply that they lacked any reasonable expectation to receive the water for the extended period of their recordable contracts. Interior's December, 1983 regulations created reasonable expectations that the landowners would be able to receive subsidized water for the extended period, but the regulations did not create constitutionally protectable expectations. A legislature may repeal a statute that created non-contractual expectations as long as there is a rational basis for repeal. *See U.S. Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174 (1980). *See also United States v. Sperry Corp.,* 58 U.S.L.W. 4018 (Nov. 28, 1989). It follows *a fortiori* that a repeal of regulations under that statute is subject to no greater judicial scrutiny. The appellants do not claim that § 224(h) fails the rational basis test.[20]

---

[19]The dissent suggests that a remand might be in order for further factual development of the contract interpretation question. We would not ordinarily quarrel with such a suggestion, but neither party offers any parol evidence to help us interpret the documents at issue. Absent parol evidence, appellate courts are in as good a position as trial courts to interpret documentary evidence.

[20]Section 224(h) by its terms is self-executing and becomes effective immediately upon enactment. The appellants claim that at a minimum they were constitutionally entitled to a "grace period" after the enactment of § 224(h) during which they could continue to receive subsidized water. They rely on cases suggesting that when a legislature imposes a new condition on a person's right to maintain ownership of certain property, the legislature must provide a sufficient period for the person to comply with the condition. *See United States v. Locke,* 471 U.S. 84 (1985); *Texaco, Inc. v. Short,* 454 U.S. 516 (1982). These cases do not govern the present case. In this case, no property right is being conditioned on any particular behavior; there is thus no need for a "grace period."

[5] In sum, since we find that the appellants never had a contractual right to receive more than ten years of water for their excess lands, Congress, in enacting § 224(h), did not deprive them of a property right within the meaning of the fifth amendment.

C. *The Separation of Powers*

[6] The appellant's next claim is that, in addition to the contracts, the stipulated judgment gave them vested rights which Congress stripped them of in enacting § 224(h). They argue that in so doing, Congress invaded the province of the judiciary and violated the principle of separation of powers.

The fifty-six page judgment settled a great number of disputes among the parties involved, concerning, among other things, priorities among various users within the District, drainage facilities, and the issues raised by the 1978 Krulitz opinion. Nowhere does the judgment discuss the issue of the price of water for excess lands under extended term contracts. The judgment requires the United States to perform the 1963 District Contract, but as we have decided, that contract does not govern the particular issue addressed by § 224(h).

The appellants argue that because at the time the parties negotiated and entered into the judgment they assumed that Interior Rule 11(i)(4) was a definitive interpretation of the RRA, the judgment therefore incorporated that interpretation of the RRA and bound the parties to it. They argue that reading the judgment to incorporate Interior's rule would be just, because, in reliance on that rule, they provided valuable consideration in the form of forfeited claims.

We doubt that even if the parties had *expressly* incorporated Interior's rule into the judgment, they would be entitled permanently to benefit from it were the law to change. "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunc-

tion. . . . The parties could not become the conscience of the equity court and decide once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute." *System Federation v. Wright,* 364 U.S. 642, 651-53 (1961). But the judgment does not provide for terms such as those spelled out in Interior's former rule. All the judgment requires is for the 1963 Contract to be performed. We have already held that § 224(h) is not inconsistent with the 1963 Contract.

The appellants did not ask the district court to modify or reopen its judgment in light of a purported change in the law.[21] They took the riskier but potentially more lucrative step of claiming the change in law was an unconstitutional act that interfered with the judgment. For the reasons stated above, this claim cannot be sustained.

AFFIRMED.

---

FERNANDEZ, Circuit Judge, dissenting:

This case involves a major reclamation project.[1] We are called upon to determine whether the government has lived up to the provisions of its contracts to supply project water to the appellants. The majority says that it has. I disagree.

The reclamation laws are found in Chapter 12 of Title 43 of the United States Code. As they have existed since long before the events that gave rise to this action, they provide for the construction of reclamation projects and the allocation of water from those projects. Reclamation projects are enor-

---

[21]We do not imply that § 224(h), in overturning Interior's regulation, necessarily changed the law as Congress had intended it to be applied.

[1]A partial history can be found in *California v. United States,* 438 U.S. 645, 90 S. Ct. 2985, 57 L.Ed.2d 1018 (1978). It need not be reiterated here.

mous undertakings, and the law reflects that fact. Before a project can be constructed, Interior must submit feasibility reports to Congress. 43 U.S.C. § 485h(a). The reports must set forth, among other things, an analysis of the cost of construction and an estimate of the portion of that cost "which can properly be allocated to irrigation and probably be repaid by the water users . . . ." 43 U.S.C. § 485h(a)(3).

The Secretary of the Interior ("Secretary") had the authority to enter into contracts with an appropriate organization for the delivery of water which would ultimately be redelivered to others for use on the land itself. 43 U.S.C. § 485h(d). An appropriate portion of the project construction costs was to be allocated to the organization to which the water was delivered, and spread over a period not to exceed 40 years. 43 U.S.C. § 485h(d). In lieu of that, the construction cost repayment could be accomplished by entering into contracts to supply water "at such rates as in the Secretary's judgment" will produce revenue sufficient to cover an appropriate share of the maintenance and operating costs, and of fixed costs, including a consideration of costs of construction. These water supply contracts can last as long as forty years. 43 U.S.C. § 485h(e).

Congress also adopted the policy that reclamation projects should not simply inure to the benefit of large landowners, whether individual or corporate. It desired that those benefits be spread more widely. It therefore decreed that before an owner of over 160 acres could receive project water for the excess lands, a recordable contract for the sale of those lands would have to be entered into between the landowner and the United States. 43 U.S.C. § 423e.

A. *The Contracts.*

It ultimately became apparent that the lands which are involved in this action, as well as other lands, would only be properly irrigated if an irrigation project were created. With-

out a project, it was likely that even existing land would ultimately return to desert, and it was clear that new land would not be developed. *See* H. Rep. No. 399, 86th Cong., 2d Sess. 2-3, *reprinted in* 1960 U.S. Code Cong. & Ad. News 2209. That realization led to the San Luis Unit Project, which was approved in 1960. Pub. L. No. 86-488, 74 Stat. 156 (1960).

On June 5, 1963, the United States entered into a forty-year contract with the District ("the 1963 contract"), in which it was agreed that water from the project would be supplied to the District. Paragraph 6 of the 1963 contract provided that water would be supplied at the price of $8 per acre foot. That included a $7.50 component for water service and a $.50 component for drainage service.[2] Paragraph 5 of the 1963 contract contemplated that the water would then be delivered to land within the District.

There were, however, limitations, and one of those was that the water would not be delivered to excess lands until the landowners had executed recordable contracts with the United States. Landowners had to agree that they would either sell their excess lands within ten years, or that the Secretary would do so after that time through the use of a power of attorney. Paragraphs 23, 24, and 25 of the 1963 contract. As the law provided, the terms and conditions of any sale of the excess lands was subject to the approval of the Secretary.[3] 43 U.S.C. § 423e.

---

[2]The price was intended to reimburse the government for its estimated costs, and was not meant to be a mere giveaway figure. Indeed, we are told that it was the highest price ever charged for water from a project of this sort. Perhaps the Secretary estimated poorly, as contracting parties often do; that should not affect our characterization of the arrangement.

[3]It is proper to note that the 1963 contract was not the result of some arrangement made in the back corridors of an administrative agency that was tricked into it by sly landowners. No one claims that it was. Quite the contrary, it was heralded at the time it was made. In fact, the final approval of the 1963 contract was the subject of a special ceremony at the White House on January 28, 1963. *See* Remarks at Signing of Water Resources Development Contracts, John F. Kennedy, 1963 Pub. Papers 104. In other words, there is no reason to treat the agreement with disrespect.

Between 1969 and 1974 all of the appellants entered into recordable contracts which conformed with the requirements of the 1963 contract.

Notwithstanding the assertions of the majority, there is not even a whisper of evidence that the contracts provided, or were intended to provide, that contract-priced water would be supplied to excess lands for a period of only ten years. One searches the contracts in vain for that language. It simply is not to be found. Instead, as already noted, it is contemplated that landowners who enter into the required contracts will receive water at the contract rate.

On its face, the 1963 contract provides that the District is entitled to receive water at the contract rate through the year 2007. The clear contemplation of that contract is that the District will then redistribute that water to the lands entitled to it, at a rate close to the contract price. This is confirmed by paragraph 17.6 of the district court's judgment of December 30, 1986. Non-excess agricultural lands are entitled to the water at those rates. So too are excess lands, if the owners have entered into recordable contracts. *See* 1963 contract, ¶ 23(a) ("No water *made available pursuant to this contract* shall be furnished to any excess lands" unless owners execute recordable contracts. Emphasis added). That applies to the appellants in this case, and the 1963 contract does not further restrict their rights.

It cannot be gainsaid that the appellants' contracts required them to sell their excess lands within ten years. Thereafter the Secretary could exercise his power of attorney. However, neither the 1963 contract nor the recordable contracts themselves expressly provide for an adjustment in rates between the time that the owner's own disposition period ends and the time that the Secretary exercises his power of attorney to sell the lands. From the end of the disposition period forward, the lands are certainly subject to disposition by the Secretary, if he has taken action. Many factors, including economic condi-

tions, could cause that action to be delayed for a significant period. In the case at hand, we know that for a very substantial time the Secretary placed himself in a position where he could not even approve sales by the owners themselves; other kinds of delays are not difficult to imagine.

The lands remained thirsty throughout the delay time, and appellants assert that the thirst was to be slaked with water supplied at the 1963 contract price. Interior assumes that is incorrect, but offers little explanation for its position. The majority asserts that there is no explicit provision that water will be supplied beyond the initial ten year period. It then dubs that an ambiguity and resolves the ambiguity against the appellants. I fail to see that as an ambiguity. What the contract *does* provide is that water will be supplied at the contract rate during the whole term of the contract. There is not a single word limiting that. Just why the fact that the contracts initially contemplated that holders of excess lands would sell them within ten years should be held to create an ambiguity that must then be summarily resolved against the appellants is not at all clear to me. I fail to see why a party must insist upon having the right to water during the term of the contract reiterated in order to avoid a later claim of ambiguity when the other party decides that it did not make a good deal in the first place.[4]

Still, I agree with the majority's apparent assumption that

[4]If there were truly an ambiguity, I would be dubious about resolving that at our level and without the development of evidence in trial court proceedings. *See International Bhd. of Elec. Workers, Local 47*, 880 F.2d 104, 107 (9th Cir. 1989). I do not believe that we could resolve it by simply relying on a maxim that ambiguities operate against adventurers. For example, there is a further maxim that ambiguous contract provisions are to be construed against the drafter even if the drafter is the government. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1033 (9th Cir. 1989) (citing *United States v. Seckinger*, 397 U.S. 203, 215-16, 90 S. Ct. 880, 887-88, 25 L.Ed.2d 224 (1970)). Here the drafter of the excess lands provisions was almost certainly the government.

the appellants could breach their contract if they improperly failed to sell during the time that they had to dispose of their excess lands. Appellants recognize that under their recordable contracts they were initially required to dispose of excess lands within ten years after the date that the contracts were entered into. They note that it was not possible to do so because the Secretary stopped approving sales in 1976. That is so, for the United States District Court for the District of Columbia enjoined the Secretary and the Bureau of Reclamation from approving any new contracts for the sale of excess lands until approval criteria and procedures were adopted. *See National Land for People, Inc. v. Bureau of Reclamation,* 417 F. Supp. 449 (D.D.C. 1976). The district court decision was no mere bolt from the blue. It issued because the Secretary had not bothered to follow the procedures that the Administrative Procedure Act imposed upon him. That brought sales of excess land to a halt, since no such procedures were adopted for many years. In other words, the appellants did not breach their agreements. If anyone breached, it was the government. It refused to carry out its end of the agreement that established the procedure for sale of the excess lands. As the majority notes, "[c]ontract obligations ordinarily are mutual." Slip op. at 5839. The government did not fulfill its part of the disposal bargain.

Nevertheless, the majority suggests that the Secretary can profit from his own lack of performance by demanding that appellants pay a higher price for water delivered to their excess lands, since they did not sell these lands within ten years. That is a most unusual result, and nothing in the contracts or the law compels it. Had the appellants breached, one could argue that the Secretary could sell the excess lands himself, or stop delivering water, or even, perhaps, refuse to deliver water unless a higher price was paid. *See United States v. Quincy-Columbia Basin Irrigation Dist.,* 649 F. Supp. 487, 492 (E.D. Wash. 1986) (Secretary may withhold water from users who fail to comply with reporting requirements). That is not this case, and we need not ruminate about the Secre-

tary's hypothetical remedies were it the case. Here it was the Secretary who was in default.[5]

Congress recognized the problems that the Secretary's dilatory conduct had caused. No doubt that is why RRA § 209(e) [43 U.S.C. § 390ii(e)] allows extension of the period for disposition, an extension that the appellants embraced when they entered into agreements with the United States to extend the period during which they could dispose of their excess lands without the direct intervention of the Secretary.

The majority's approach frustrates the policy underlying section 209(e). By enacting this provision, Congress conceded that the 1976-1982 period ought not be counted within the 10-year disposition period. The Senate Report stated: "This section provides for an extension of the 10-year time period for disposal of excess lands subject to existing recordable contracts which is equal to the period of time for which there has been a moratorium on the approval of sales of such lands by the Secretary of the Interior." S. Rep. No. 373, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2570, 2579. The policy behind RRA § 209 assures landowners that they may have the benefit of a full ten years to dispose of their land, during which time the Secretary will continually be prepared to uphold his side of the agreements. The majority notes that one could extend the time to dispose of the land without extending the 1963 contract rate to that period. Slip

[5]The majority's suggestion that Interior did not default at all, because it simply disabled itself from performing when it failed to pass regulations that would enable it to do so is both intriguing and surprising. It opens up tenebrous vistas of contractual perfidy. *Horowitz v. United States*, 267 U.S. 458, 45 S. Ct. 344, 69 L. Ed. 736 (1925) is distinguishable. There one Board agreed to ship goods, but another Board decreed that no one could ship that general type of goods. The Supreme Court held that the plaintiff could not claim a breach on the theory that a rule which bound everyone else should not affect his contract. Our case is quite different. Here the Secretary had to approve of sales and the Secretary failed to take proper steps to enable himself to do so.

op. at 5841-42. Of course one could. That position, however, would not consider the economic effects of vastly increasing the cost of water during that time.[6] It would not recognize that the increase could turn a viable agricultural enterprise into a losing proposition and, thus, punish the landowners for the Secretary's own default by preventing them from selling while denying them contract-priced water. Appellants assert that their added cost will be as much as $5,000,000.

In sum, it can be said that if the owners themselves refused to sell their excess lands during the time that they had to dispose of those lands, they would be in breach of their contracts. However, there is no evidence that they would not be entitled to the water before that point was reached. Here the landowners could not be said to be in breach of their recordable contracts, as long as the extended period set forth in RRA § 209 [43 U.S.C. § 390ii] was applicable to them. At least during that time, the judgment directed the United States to perform the 1963 contract.

It is not necessary to decide whether appellants' right to water at the contract rate extends beyond the time that they will be required to dispose of their lands under the existing recordable contracts. There is no reason to assume that they will not dispose of the lands in accordance with the terms of those contracts. This court need not reflect upon appellants' rights under the 1963 contract, as confirmed and enforced by the December 30, 1986 judgment of the district court, should they fail to do so.[7]

Therefore, at the time that Congress added section 224(h) to the RRA [43 U.S.C. § 390ww(h)] appellants had an existing

[6]In this case, for example, the increase was over fivefold, $42 rather than $8.

[7]The question of whether that failure would actually be a breach of contract need not be mooted. Nor need we determine what the Secretary's remedies would be under that now hypothetical circumstance.

contract right to receive water for their excess lands at the 1963 contract rate. More than that, they had a judgment which directed that the District and the United States "perform the 1963 Contract" (paragraph 4.1), and which further ordered the District to deliver water to the landowners at the price that it pays the United States, plus its overhead and delivery costs (paragraph 17.6).

B. *The 1987 Legislation; Separation of Powers.*

Since the appellants did have contractual rights to receive water, it is necessary to extend this dissent to a discussion of the effect, if any, of section 224(h) [43 U.S.C. § 390ww(h)][8] upon those rights.

As already noted, by the time section 224(h) was enacted, a judgment which directed the United States to abide by the terms of the 1963 contract had been entered in this case. One provision of that judgment made it clear that the water prices were to pass through to the landowners in the District, and nothing in the 1963 contract, the recordable contracts, or the judgment states that excess lands were not entitled to receive the benefits of that pricing.

The fact that the judgment was a consent judgment did not change its essential character. It was still a judicial act; it was as sacrosanct as if it had been entered after a full trial — no more, no less. *See System Fed'n No. 91 v. Wright,* 364 U.S. 642, 650-51, 81 S. Ct. 368, 373, 5 L.Ed.2d 349 (1961); and *United States v. Swift & Co.,* 286 U.S. 106, 114-15, 52 S. Ct. 460, 462, 76 L.Ed. 999 (1932).

If in the face of the judgment requiring that the 1963 contract be carried out Congress adopted a statute for the purpose of overturning that result, we would be faced with a

[8]Although the section was not originally part of the RRA, it will hereafter be referred to as RRA § 224(h).

serious constitutional problem. Congress would then have "passed the limit which separates the legislative from the judicial power." *United States v. Klein,* 80 U.S. (13 Wall.) 128, 147, 20 L.Ed. 519 (1872). As the Court observed in *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 431, 15 L.Ed. 435 (1856):

> [I]t is urged that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

Were Congress to cross that line and attack a judgment that had fixed the rights of the parties, it could trench upon the powers of the judiciary in a manner unknown since the Reconstruction Era problems that spawned *Klein.* A court should be wary of an invitation to find that Congress has done just that. Rather, it should approach the issues as other courts have in the not far distant past.

In *Daylo v. Administrator of Veterans' Affairs,* 501 F.2d 811 (D.C. Cir. 1974), the Administrator claimed that a statute was intended to upset certain judgments which had become final. The court noted that were the administrator correct, it would be faced with a "serious constitutional dilemma." *Daylo,* 501 F.2d at 816. That was because the legislature simply lacks power to do such a thing, and "[a] contrary general rule would subject all judicial action to superior legislative review, a regime obviously inconsistent with due process of law and subversive of the constitutional independence of the judicial branch of government." *Id.* The court then went on to note that the judicial branch will construe a statute to avoid a finding of unconstitutionality if the statute can fairly bear

that construction. *Daylo,* 501 F.2d at 819. The court then added the following at page 819 of its Opinion:

> Furthermore, where a statute lies in the shadow of constitutional doubt, its proper construction will usually require an exploration of legislative history.
>
> > [W]hen one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a "clear statement" of a contrary legislative intent.
>
> *United States v. Thompson,* 147 U.S. App. D.C. 1, 5, 452 F.2d 1333, 1337 (1971), *cert. denied,* 405 U.S. 998, 92 S. Ct. 1251, 31 L.Ed.2d 467 (1972).

A similar approach was taken by the district court in *I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc.,* 612 F. Supp. 643 (D.D.C. 1985). In that case, a defendant argued that amendment of the statutes regarding withdrawal liability from multi-employer pension plans had overturned a judgment that determined liability in the case before the court. The court noted the constitutional difficulty that would cause, but after applying the *Daylo* approach it found that it was "both reasonable and consistent to read this provision as *excluding* any such liability that is reduced to final judgment." *I.A.M.,* 612 F. Supp. at 647 (emphasis in original). It, therefore, had no reason to find that an unconstitutional statute had been adopted.

That is a proper approach to statutory construction. Nor can it be said that the judgment in this case is the kind that presents an exception to the general rule. The judgment was not inherently subject to modification by Congress in light of later events. This case is quite unlike *Wheeling Bridge,* 59 U.S. (18 How.) 421, where the Court had declared that a

bridge was an obstruction to interstate commerce and had ordered that it be removed. Congress could, and did, decide that the bridge would not be in violation of past statutes, and that it could be maintained in place. Since Congress was the ultimate competent authority to decide whether a structure would impede or facilitate commerce, it could hardly be said that Congress was not able to do so. Rather, as the Court noted, what used to be an obstruction in contemplation of the law no longer was. The Court, instead, said it was "quite plain the decree of the court cannot be enforced." *Wheeling Bridge,* 59 U.S. (18 How.) at 432.

Similarly, in *Hodges v. Snyder,* 261 U.S. 600, 43 S. Ct. 435, 67 L.Ed. 819 (1923), the Court approved of legislation that validated the consolidation of a school district after a prior court order had enjoined it. There, too, the law had not provided for the consolidation, but after a court had made its decree, the legislature closed that gap. The Court's decision clearly separated the two aspects of the issue as it was presented. As the Court said in *Hodges,* 261 U.S. at 603-04, 43 S. Ct. at 436:

> It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. . . .
>
> This rule, however, as held in the *Wheeling Bridge Case,* does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away.

Here we are not dealing with some public right that Congress can change at will. We are dealing with a judgment arising out of very specific contracts, and the only public aspect is that the contracts were with the government. That aspect should make the contracts even less subject to the vicissitudes of legislation. *See Perry v. United States,* 294 U.S. 330, 55 S. Ct. 432, 79 L.Ed. 912 (1935); *Lynch v. United States,* 292 U.S. 571, 54 S. Ct. 840, 78 L.Ed. 1434 (1934); *The Sinking Fund Cases,* 99 U.S. 700, 25 L.Ed. 496 (1879). *Cf. Norman v. Baltimore & O. R. Co.,* 294 U.S. 240, 55 S. Ct. 407, 79 L.Ed. 885 (1935). There is no reason to find that the judgment ordering enforcement of the 1963 contract stands on shakier grounds. Rather, this case is more like *Daylo,* 501 F.2d 811, and *I.A.M.,* 612 F. Supp. 643. Specific and valuable rights are involved, and the judgment deserves enforcement. Application of these principles to this case demonstrates that no constitutional infirmity is shown.

There can be little doubt that RRA § 224(h) [43 U.S.C. § 390ww(h)] was intended to have an effect upon contracts with the United States that existed before the date of its enactment. Its explicit terms make that clear. In that regard, it should be noted that the section refers to RRA § 205(c) [43 U.S.C. § 390ee(c)]. The latter section did specifically appear to apply to pre-October 12, 1982 contracts, but RRA § 203(b) [43 U.S.C. § 390cc(b)] made it equally clear that section 205(c) was not applicable to those contracts unless the provisions of section 203(a) or (c) were applicable. There can be no doubt that the appellants in this case did not become subject to those section 203 provisions. If there were a doubt, it has been removed by the parties' stipulation to the contrary.

While RRA § 224(h), which was added in 1987, did purport to be a mere construction of the RRA adopted in 1982, it is parlous indeed to determine the intention of the 97th Congress on the basis of what the 100th Congress says that intention was. *See Firestone Tire & Rubber Co. v. Bruch,* _ U.S. _, 109 S. Ct. 948, 956, 103 L.Ed.2d 80 (1989); *United States v.*

*Price,* 361 U.S. 304, 313, 80 S. Ct. 326, 332, 4 L.Ed.2d 334 (1960); and *United States v. United Mine Workers,* 330 U.S. 258, 282, 67 S. Ct. 677, 690, 91 L.Ed. 884 (1947). The structure of the statute, its very clarity, makes it apparent that its language must control at all times prior to the enactment of RRA § 224(h). Of course, I do not say that Congress was unable to amend the statute. Rather, I say *that* is precisely what Congress did in 1987. By that amendment, it expressed its intention that the RRA provisions for higher water rates apply to individuals who had contracts which existed before 1982.[9] That being so, I must consider whether the legislation also affected the judgment in this case. It did not.

As noted above, RRA § 224(h) was actually a part of the Omnibus Budget Reconciliation Act of 1987, a not unusual budgetary bill with a potpourri of provisions on various subjects. It was a result of many compromises hammered out in a conference committee of the United States Senate and the United States House of Representatives. Neither bill that went to that committee made any reference to this subject. *See* H.R. 3545, 100th Cong., 1st Sess.[10] I do not say this by way of criticism; I say it by way of noting that there is no material from which we could derive more precise knowledge of legislative intent than the statute itself provides. Certainly that history does not speak to the judgment in this case or to any other judgment entered by the courts of the United States.

---

[9]I need not and do not express an opinion on the propriety of legislation which sets out to affect contract rights between the United States and others. Suffice it to say that it presents knotty constitutional problems of its own. *See Perry v. United States,* 294 U.S. 330, 55 S. Ct. 432, 79 L.Ed. 912 (1935); *Lynch v. United States,* 292 U.S. 571, 54 S. Ct. 840, 78 L.Ed. 1434 (1934); and *The Sinking Fund Cases,* 99 U.S. 700, 25 L.Ed. 496 (1879).

[10]The Senate version started as S. 1920, 100th Cong., 1st Sess., but what it sent to the Conference Committee was a much changed version of H.R. 3545.

I recognize that we have been referred to remarks made by Representative Miller at the time the Omnibus Budget Reconciliation Act of 1987 was being considered. 133 Cong. Rec. E4995-96 (daily ed. Dec. 22, 1987). His remarks are interesting.[11] However, they cannot change the construction of the statute. First, it would be quite dangerous to ascribe the opinions of Representative Miller to the whole Congress of the United States, and thereby determine that body's intention on this subject when it passed an enormous budgetary act. *Cf. Regan v. Wald,* 468 U.S. 222, 237, 104 S. Ct. 3026, 3035, 82 L.Ed.2d 171 (1984). *See also Green v. Bock Laundry Mach. Co.,* _ U S. _, 109 S. Ct. 1981, 1994, 104 L.Ed.2d 557 (1989) (Scalia, J., concurring). Second, even Representative Miller did not expressly state that there was an intent to overturn any judgment of a court which had fixed the rights of the parties.

I would therefore hold that Congress did not intend to affect the judgment in this case when it enacted RRA § 224(h), and that the enactment of that section did not violate the constitutional provisions which allocate powers between the branches of government.[12] I would also eschew

---

[11]Representative Miller provided the following rationale in support of the bill:

> [T]he Department, as is far too often the case in its mismanagement of the reclamation program, bowed to heavyhanded lobbying and allowed large landowners in California to receive a windfall worth tens of millions of dollars.
>
> . . . [T]his windfall surely ranks as one of the most egregious giveaways in the history of the reclamation program. This bill will end that giveaway by clearly curtailing the subsidies and saving taxpayers tens of millions of dollars that the administration was prepared to give away.

[12]The majority seems to suggest that this conclusion is little more than resolution of a claimed statutory ambiguity in the usual sense. *See* slip op. at 5841-42 n.15. I disagree. As the authorities cited in this portion of the dissent indicate, great clarity of purpose should appear before we attribute the intent to overturn judicial decrees to Congress. That is quite different from simply construing a statute to determine whether it applies to a certain set of facts.

the Secretary's interpretation of that statutory language insofar as he has attempted to apply it to these appellants. While I am aware of the fact that we should usually give deference to administrative interpretations, we do not do so if the interpretations are in conflict with the law. *See Public Employees Retirement Sys. v. Betts*, _ U.S. _, 109 S. Ct. 2854, 2863, 106 L.Ed.2d 134 (1989). That is particularly true where, as here, the interpretations would raise serious doubts about the constitutionality of the statute itself. *See Daylo*, 501 F.2d 811, and *I.A.M.*, 612 F. Supp. 643.

It follows that the appellants were entitled to receive water at the rate set forth in the 1963 contract, without regard to the provisions of RRA § 224(h). Moreover, they should not be subject to the provisions of RRA § 205 [43 U.S.C. § 390ee] during the period that they have been given to dispose of their excess lands pursuant to their existing recordable contracts, unless they take action to bring themselves within those provisions in the manner provided in RRA § 203 [43 U.S.C. § 390cc]. As I have already noted, we need not decide whether that right extends beyond the time that they would be required to dispose of their lands under the existing recordable contracts.

When these contracts were entered into the appellants had every reason to expect an irenic future in which their labor would combine with ample, reasonably-priced water to produce bountiful crops. That future was not to be. The Secretary's various acts have caused delay, litigation, and greatly increased water prices for a portion of appellants' lands. I would not permit the government to thus break faith with the appellants. I would hold it to its contracts.

For these reasons I must respectfully dissent.

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARCELLOS and WOLFSEN, INC., et al.,
Plaintiffs,
and
BOSTON RANCH COMPANY;
EDWIN R. O'NEILL; WEST HAVEN
FARMING CO.,
Plaintiffs - Appellants,
v.
WESTLANDS WATER DISTRICT, et al.,
Defendants,
and
UNITED STATES DEPARTMENT OF INTERIOR,
Defendant - Appellee.

No. 89-15098
DATE OF ENTRY: JUNE 7, 1990

ORDER

The panel as constituted above has voted unanimously to deny the petition for rehearing.

The opinion filed March 16, 1990 is amended by adding the following paragraph to footnote 18 of the opinion:

> The *Charles River Bridge* rule is simply another way of stating that "governmental contracts 'should be construed, if possible, to avoid foreclosing exercise of sovereign authority.' " *Peterson v. Dept. of Interior*, No. 87-2681, slip op. 2761, 2783 (9th Cir. March 14, 1990) (quoting *Bowen*

*v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)).

The full court has been advised of the above amendment and the suggestion for rehearing en banc and no judge of the court has requested a vote. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

# APPENDIX C

ORIGINAL
FILED
AUG 10 1988
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARCELLOS AND WOLFSEN, INC., et al.,

Plaintiffs,

v.

WESTLANDS WATER DISTRICT, et al.,

Defendants.

---

AND RELATED CROSS-ACTIONS.

---

CV F-79-106 EDP
Consolidated With:
CV F-81-245 EDP

MEMORANDUM DECISION RE:
MOTION TO ENFORCE JUDGMENT

The above-entitled ligitation had its origins in the repudiation by the Secretary of the Interior, of a certain water contract between the Bureau of Reclamation and the Westlands Water District, which the parties entered into in 1965.

The factual background leading up to that litigation is as follows. In 1963, the Westlands Water District (hereafter the "District") entered into a water service

contract with the Department of Interior (hereafter "Interior"). The contract provided that beginning in 1979 (the 16th year of the contract), Interior would provide 783,000 acre feet of water at $8.00 per acre foot, (see Articles 2(d) and 6(a)), plus a service component of not more than 50¢ for the interceptor drain and $7.50 for the water service component.

Article 23a of the contract provides in pertinent part:

> LAND NOT TO RECEIVE WATER FURNISHED TO DISTRICT BY UNITED STATES UNTIL OWNERS THEREOF EXECUTE CERTAIN CONTRACTS
>
> 23. (a) No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided. No sale of any excess lands shall carry the right to receive water made available pursuant to this contract unless and until the purchase price involved in such sale is approved by the Contracting Officer and upon proof of fraudulent representation as to the true

> consideration involved in such sales the United States may instruct the District by written notice to refuse to furnish any water subject to this contract to the land involved in such fraudulent sales, and the District thereafter shall not furnish said water to such lands until such written notice is withdrawn.

The use of the term "valid recordable contracts" in the foregoing article should be noted.

Article 24 of the 1963 contract contains the provisions for the sale of excess lands.

Article 25 of the 1963 contract defines excess lands as acreage in excess of 160 acres "held in the beneficial ownership of one person".

Article 25(i) provides that if the landowner has not disposed of the lands within 10 years, the Secretary shall have the power to do so "subject to the same conditions on the part of the landowner".

The decision by an official that the 1963 agreement was invalid, together with Interior's demand that the District pay a higher rate for water, triggered this litigation.

The litigation was ended by the parties entering a stipulated judgment, which provided in pertinent part:

> This judgment shall govern the rights and duties of all parties for its term commencing the first day of the month following entry of this judgment and terminating on December 31, 2007, except as provided in paragraph 13.3 below and Exhibit "K" to this judgment.[1]

---

[1] An examination of paragraph 13.3 and the Exhibit "K" attached to the judgment, reveals that neither the paragraph nor document has affected the termination of the judgment.

As part of the Omnibus Budget Reconcilation [*sic*] Act (PL100-203, section 502) Congress provided in pertinent part as follows:

> (h) The provisions of section 205(c) are and have been applicable to all recordable contracts executed prior to October 1982 and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked: *Provided,* That notwithstanding the provisions of subsection (i), the Secretary shall not seek reimbursement for any amounts due under this subsection or section 205(c) which was due prior to the date of enactment of his [*sic*] subsection.
>
> (i) When the Secretary finds that any individual or legal entity subject to reclamation law, including this Act, has not paid the required amount for irrigation water delivered to a landholding pursuant to reclamation law, including this Act, he shall collect the amount of any underpayment with interest accruing from the date the required payment was due until paid. The interest rate shall be determined by the Secretary of the Treasury on the basis of the weighted average yield of all interest bearing marketable issues sold by the Treasury during the period of underpayment.

Pursuant to this legislative mandate, the Bureau of Reclamation, as the operating agency, has billed certain landowners situated in the Westlands Water District substantial amounts of money representing the alleged underpayment due from said landowners for water delivered after the effective date of the judgment. Certain of the affected landowners have filed the instant motions to enforce the judgment and to prevent the collection of said amounts.

The government's response is that the judgment does not refer to the amount that the excess lands are to pay for water.

Rule 70 of the Federal Rules of Civil Procedure provides that:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the costs of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

As was pointed out supra, the stipulated judgment consisted not only of the judgment itself, but also the various exhibits attached hereto.

The parties have not presented the Court with an exhaustive review of the negotiations leading to this judgment. However, the Court, in its capacity as the monitor of this litigation, was aware that it was long and

protracted. The Court is also aware that Congress was given an oversight function with regard to this judgment, i.e., that Congress was given a specified number of days to object to the judgment. No objections were lodged.

A review of the judgment reveals its completeness.

Paragraph 5 of the judgment provides for the types of action that may be employed to enforce the judgment. The moving parties, who were members of the class engaged in the original litigation, have employed one of the alternative methods mandated in Paragraph 5, and are "parties" as per the definition contained in Paragraph 1.

In Paragraph 4 of the judgment, the parties have agreed, and the Court has ordered, that the terms of the 1963 contract be performed. As pointed out above, the 1963 contract provided a water rate for excess lands governed by a recordable contract at variance with the rate being charged.

On January 21, 1971, Boston Ranch, one of the moving parties, executed recordable contracts covering 23,575 excess acres. In 1973 and 1974, West Haven executed five (5) recordable contracts resulting in 5,406 acres of excess lands. The remaining party, O'Neill, recorded his contracts in 1969 and 1970 covering his 948 acres of excess lands. The 10-year period, which originally was the outer limits of time during which excess lands could receive reclamation water at a reduced rate, has long since expired.[2] However, after the judgment and/or until the enactment of section 502 of the Omnibus

---

[2] Congress, in its passage of the Reclamation Act of 1982, provided for the tolling of the 10-year period for the sale of excess lands. *See* 43 USC § 390ii(e). Whether the recordable contracts held by the moving parties are covered by this provision, or alternately, not effected, is a fact question. Since there is no evidence before the Court on this issue, the Court cannot resolve it.

Reconcilation [*sic*] Act, Interior had delivered water for the use on excess and non-excess lands at the same rate, i.e., $8.00 per acre feet.

In 1982, Congress issued 43 USC section 390cc which provides:

> New of amended contracts.
>
> (a) The provisions of this title shall be applicable to any district which —
>
> (1) enters into a contract with the Secretary subsequent to the date of enactment of this Act [enacted Oct. 12, 1982];
>
> (2) enters into any amendment of its contract with the Secretary subsequent to the date of enactment of this Act [enacted Oct. 12, 1982] which enables the district to receive supplemental or additional benefits; or
>
> (3) which amends its contract for the purpose of conforming to the provisions of this title.
>
> (b) Any district which has an existing contract with the Secretary as of the date of enactment of this Act [enacted Oct. 12, 1982] which does not enter into an amendment of such contract as specified in subsection (a) shall be subject to Federal reclamation law in effect immediately prior to the date of enactment of this Act [enacted Oct. 12, 1982], as that law is amended or supplemented by sections 209 through 230 of this title [43 USCS § 390ii-390zz-1]. Within a district that does not enter into an amendment of its contract with the Secretary within four and one-half years of the date of enactment of this Act [enacted Oct. 12, 1982], irrigation water may be delivered to lands leased in excess of a landholding of one hundred and

> sixty acres only if full cost, as defined in section 202(3)(A) of this title [43 USCS § 390bb(3)(A)], is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres; Provided, That the interest rate used in computing full cost under this subsection shall be the same as provided in section 205(a)(3) [43 USCS § 390ee(a)(3)].
>
> (c) In the absence of an amendment to a contract, as specified in subsection (a), a qualified recipient or limited recipient may elect to be subject to the provisions of this title by executing an irrevocable election in a form approved by the Secretary to comply with this title. The district shall thereupon deliver irrigation water to and collect from such recipient, of the credit of the United States, the additional charges required by this title and assignable to the recipient making the election.

A careful reading of the foregoing provisions indicates a clear intention by Congress to have all contracts and/or water recipients comply with the 1982 Reclamation Act. This was to be done by the water district servicing the recipient entering into amended contracts, or in the case of recipients, by executing an irrevocable election to be bound by the terms of the amendments contained in the 1982 Act. Presumably, being within a contracting district satisfies the requirement.

The issue before the Court is this: did the District amend its existing contract (i.e., the 1963 Contract) by the Stipulated Judgment? Or alternately, was the Stipulated Judgment an attempt to defeat the Congressional policy as announced in the 1982 revisions to the Federal

Reclamation law? A different analysis is necessary depending upon how that question is answered.

A quick perusal of the 1982 Reclamation Act indicates that Congress has not directly addressed the problem confronting the Court in this case, i.e., at what rate are excess lands created by pre-October 12, 1982 recordable contracts entitled to receive water. 43 USC section 390ee demonstrates a clear intention by Congress that excess lands shall pay the full cost of water. The closest that Congress comes to addressing this subject is 43 USC section 390ee(b) and (c), which provide as follows:

> (b) Any contract with a district entered into by the Secretary as specified in section 230 [43 USCS § 390cc], shall provide for the delivery of irrigation water to lands not in excess of the landholdings described in subsection (a) upon terms and conditions related to pricing established by the Secretary pursuant to Federal reclamation law in effect immediately prior to the date of enactment of this Act [enacted Oct. 12, 1982], or in the case of an amended contract, upon the terms and conditions established by such contract prior to the date of its amendment. However, the portion of any price established under this subsection which relates to operation and maintenance charges shall be established pursuant to section 208 of this title [43 USCS § 390hh].
>
> (c) Notwithstanding any extension of time of any recordable contract as provided in section 209(e) of this title [43 USCS § 390ii(e)], lands under recordable contract shall be eligible to receive irrigation water at less than full cost for a period not to exceed ten years from the date such recordable contract was executed by the

> Secretary in the case of contracts existing prior to the date of enactment of this Act [enacted Oct. 12, 1982], or five years from the date such recordable contract was executed by the Secretary in the case of contracts entered into subsequent to the date of enactment [enacted Oct. 12, 1982], or the time specified in section 218 [43 USCS § 390rr] for lands described in that section: Provided, That in no case shall the right to receive water at less than full cost under this subsection terminate sooner than eighteen months after the date on which the Secretary again commenced the processing or the approval of the disposition of such lands. (Oct. 12, 1982, P. L. 97-293, Title II, § 205, 96 Stat. 1265.)

Subsection (b) is a clear statement of Congressional pricing policy relative to reclamation water. Subsection (c), on the other hand, is not at all clear — did Congress intend to limit, absolutely, the right of excess land to receive reclamation water at the reduced rate to 10 years and no more? It should be noted that the 10-year figure was formerly used in conjunction with such lands, i.e., the date upon which they had to be sold.[3] A sale of the lands, of course, could end the excess/non-excess problems for the selling landowner. Hence, the use of the

---

[3] 43 USC section 390ee(b) and (c) are a departure from prior law. Previously, the statutory scheme, roughly speaking, was to allow the sale of water at reclamation rates if the recipient signed a recordable contract agreeing to sell the land at the end of 10 years at a price that reflected an increase in value due to the irrigation. This requirement was tampered with by Congress and the bureaucrats for a variety of reasons. 43 USC section 390ee(b) and (c) represent the first time that Congress may have used the 10-year period in a different manner, i.e., to determine the absolute time limit that excess lands could receive water at less than full cost.

10-year period in other sections would be of no help in deducing the intention of Congress in the new Act.

A review of the Congressional record is likewise nonproductive. Congress did turn its attention to the provisions in 43 USC section 390ee as follows:

> Section 7(a)(2). — This section prohibits the delivery of irrigation water to excess lands which are, or are capable of, receiving irrigation water as of the date of enactment of S. 1867, unless disposal of such lands is required by a recordable contract or the owners of such lands have requested that a recordable contract be executed.
>
> Section 7(b). — This section requires that the period for disposal of excess lands not exceed 10 years.
>
> Section 7(c). — Under this section landowners may only amend their existing recordable contracts to reflect the new acreage limitations of S. 1867.
>
> Section 7(d). — This section provides that excess lands which are sold by the Secretary by power of attorney after expiration of the 10-year recordable contract period (which is a procedure of existing law) shall be sold only to qualified recipients and by impartial selection of buyers. No authority is granted to apply such restrictions to sales made by owners within the 10-year recordable contract period.
>
> The Committee intends that excess land will continue to be appraised and sold at a price that does not reflect the value of the availability of irrigation water from the Federal project. Improvements made which are unrelated to irrigation water deliveries would be included in

> the fair market value, including such improvements as have been made for water delivery which are not related to irrigation water made available from a reclamation project; for example, groundwater pumps and delivery systems.
>
> Section 7(e). — This section provides for an extension of the 10-year time period for disposal of excess lands subject to existing recordable contracts which is equal to the period of time for which there has been a moratorium on the approval of sales of such lands by the Secretary of the Interior.

See 3 U.S. Code Congressional and Administrative News — 97th Congress, Second Session 1982, 2570 *et seq.*

These excerpts, on the other hand, would indicate that Congress did not think that it was changing the law.

The parties have not addressed the issue discussed by the Court above. Plaintiffs' brief consists of a broadside of constitutional and other principles that do not help the Court. The government's position that the judgment doesn't address the problem is equally wide of the mark.

The Court finds that the parties have standing to make the motion. However, the Court has not been furnished with the necessary information to solve the problem. Defendant's motion is denied without prejudice.

DATE: August 9, 1988.

/s/ Edward Dean Price
EDWARD DEAN PRICE
United States District Judge

ORIGINAL
FILED
DEC 8 1988
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARCELLOS AND WOLFSEN, INC., et al.,
Plaintiffs,
v.
WESTLANDS WATER DISTRICT, et al.,
Defendants.

---

AND RELATED CROSS-ACTIONS.

---

WESTLANDS WATER DISTRICT,
Plaintiffs-in-Consolidation,
v.
UNITED STATES OF AMERICA, et al.,
Defendants-in-Consolidation,

---

AND RELATED CROSS-ACTIONS.

---

CV F-79-106 EDP
Consolidted [*sic*] With:
CV F-81-245 EDP

## ORDER DENYING MOTION TO ENFORCE THE JUDGMENT

The Court has previously denied moving parties' motion to enforce a stipulated judgment in this case without prejudice.

In its prior memorandum decision, the Court outlined the factual background of this motion. However, the Court did not emphasize that the settlement consisted of reaffirming the 1963 contract and certain agreements amending the same. Although given the opportunity to do so, Congress did not object to the agreement or any part thereof.

Neither counsel has addressed or even commented on the new provisions that have been added to 43 C.F.R. part 426.

43 C.F.R. 426.1 announces that one of its objectives is to insure that the Federal Government receive the full cost of providing water to landholdings which exceed established limits.

43 C.F.R. 426.2(c) provides:

> Sections 426.5 through 426.12 of these regulations apply variously to all districts subject to the acreage limitation and full-cost provisions of Reclamation law. The way in which they apply depends upon whether the district has (1) a contract which was in force on October 12, 1982, (2) a contract which was amended after October 12, 1982, or (3) a contract which was entered into after October 12, 1982.
>
> Application of these sections will also vary depending upon whether an individual or entity subject to Reclamation law has made an irrevocable election to conform to the discretion-

ary provisions of the Reclamation Reform Act of 1982.

43 C.F.R. 426.4(b) provides:

> The term 'contract' means any repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States including normal operation, maintenance, and replacement costs pursuant to Federal Reclamation law. All water service and repayment contracts are considered contracts even if the contract does not specifically identify that portion of the payment which is to be attributed to operation and maintenance and that which is to be attributed to construction.

43 C.F.R. 426.4(dd) provides:

> The term 'recordable contract' means a written contract between the Secretary and a landowner capable of being recorded under State law, providing for the sale or disposition of land held by that landowner in excess of the ownership limitations of Federal Reclamation law.

43 C.F.R. 426.5 differentiates among contracts in force on October 12, 1982, new contracts entered into after October 12, 1982, and amended contracts. This section further provides certain mandatory provisions that must be included in either new contracts or amendments to existing contracts. Neither counsel has addressed whether the stipulated judgment in this case was either a new contract or an amendment to an existing contract.

43 C.F.R. 426.4 makes a further distinction between amendments to contracts which provide additional or supplemental benefits, and those that do not so provide.

Different provisions must be included in each type of contract.

It should be noted that in 43 C.F.R. 426.11(i)(1), the Secretary of Interior mandated that:

> Westlands Water District, California. Beginning July 10, 1984, the Secretary again commenced processing the sales of excess land under recordable contract in the Westlands Water District, California. Such land will be allowed a period of time equal to the time remaining on that recordable contract on August 13, 1976, to sell land under recordable contract. The Secretary will notify the affected landowners as to applicable dates.

No party to this lawsuit has addressed the issue as to whether the Stipulated Judgment was a new contract, an amendment to an existing contract, or none of the above. Further, the validity of the agreements underlying the judgment in view of the 1982 amendments to the Reclamation Act, have not been addressed. The federal defendant's flat statement that the judgment does not apply to plaintiffs' present complaints hardly solves the problem.

The Court notes that on June 10, 1988, the Department of Interior published its proposed rules to comply with the Omnibus Budget Reconciliation Act of 1987, enacted on December 22, 1987. These rules appear in 53 Federal Register 21857-01. Some of the rules cited above are included in the proposed amendments. The subject matter of the relief that the moving parties seek in this matter may be addressed in these rules. Counsel's attention is directed thereto.

Finally, and most important, the Congress of the United States was not a party defendant/signatory to the judgment in question. The complained of action is an

action by Congress, and must be judged independent of the provisions of the judgment and appended agreements. To ask this Court to enforce the judgment as against the federal defendants named in the action would pit one agency of the federal government against the other without having the affected branch before the Court.

On reconsideration, it is the decision of the Court that the plaintiff's motion to enforce the judgment is denied.

DATED: December 7, 1988.

/s/ Edward Dean Price
EDWARD DEAN PRICE
United States District Judge

# APPENDIX D

# UNITED STATES CONSTITUTION

## U.S. CONST. art. I, § 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

## U. S. CONST. art. III, §§ 1 and 2

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall

be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# APPENDIX E

# SECTION 9(e)
# RECLAMATION PROJECT ACT OF 1939, ch. 418, 53 Stat. 1193; 43 U.S.C. § 485h (e)

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

# APPENDIX F

## SECTION 46
## OMNIBUS ADJUSTMENT ACT OF 1926, ch. 383, 44 Stat. 649; 43 U.S.C. § 423(e)

No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such

excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.

# APPENDIX G

## SECTION 203(b)
## RECLAMATION REFORM ACT OF 1982,
## Pub. L. 97-293, 96 Stat. 1265;
## 43 U.S.C. § 390cc (b) (first sentence)

Any district which has an existing contract with the Secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title [43 U.S.C.A. §§ 390ii to 390zz-1, 373a, 422e, 425b, 485h]. . . .

## SECTION 209(e)
## RECLAMATION REFORM ACT OF 1982,
## Pub. L. 97-293, 96 Stat. 1268;
## 43 U.S.C. § 390ii (e)

In the event that the owner of any lands in excess of the ownership limitations of Federal reclamation law has heretofore entered into a recordable contract with the Secretary for the disposition of such excess lands and has been prevented from disposing of them because the Secretary may have withheld the processing or approval of the disposition of the lands (whether he may have been compelled to do so by court order or for other reasons), the period of time for the disposal of such lands by the owner thereof pursuant to the contract shall be extended from the date on which the Secretary again commences the processing or the approval of the disposition of such lands for a period which shall be equal to the remaining period of time under the recordable contract for the disposal thereof by the owner at the time the decision of the Secretary to withhold the processing or approval of such disposition first became effective.

## SECTION 205(c)
## RECLAMATION REFORM ACT OF 1982,
## Pub. L. 97-293, 96 Stat. 1266;
## 43 U.S.C. §390ee (c)

Notwithstanding any extension of time of any recordable contract as provided in section 390ii(e) of this title, lands under recordable contract shall be eligible to receive irrigation water at less than full cost for a period not to exceed ten years from the date such recordable contract was executed by the Secretary in the case of contracts existing prior to October 12, 1982, or five years from the date such recordable contract was executed by the Secretary in the case of contracts entered into subsequent to October 12, 1982, or the time specified in section 390rr of this title for lands described in that section: *Provided*, That in no case shall the right to receive water at less than full cost under this subsection terminate sooner than eighteen months after the date on which the Secretary again commences the processing or the approval of the disposition of such lands.

# APPENDIX H

# FORMER INTERIOR RULE 11(i)(4) (1983); FORMER 43 CFR § 426.11(i)(4) (1983)

Land under recordable contract which is held by a water user not subject to the discretionary provisions of title II may continue to receive irrigation water at the contract water rate for the extended term of the contract, except as provided in section 426.11(e). Land under recordable contract which is held by a qualified or limited recipient may continue to receive irrigation water deliveries at the contract rate for the original disposition period of the recordable contract. The water rate for land under recordable contract held by a qualified or limited recipient during an extended contract period shall be determined as follows: The contract water rate shall apply until the date 18 months after the date the Secretary resumes the processing of excess land sales, or until the extended contract period expires, whichever occurs first, and after the date 18 months from the date the Secretary resumes the processing of excess land sales, water deliveries shall be made at full cost for the duration of the extended contract period.

# APPENDIX I

**SECTION 5302**
**OMNIBUS BUDGET RECONCILIATION ACT OF 1987,**
**Pub. L. 100-203, 101 Stat. 1330-268 to 1330-269;**
**adding *inter alia* § 224(h)**
**Reclamation Reform Act,**
**43 U.S.C. § 390ww (h)**

SEC. 5302. RECLAMATION REFORM ACT AMENDMENTS.

(a) AUDIT. — Section 224 of the Reclamation Reform Act of 1982 (Public Law 97-293) is amended by adding the following new subsections after subsection (f):

"(g) In addition to any other audit or compliance activities which may otherwise be undertaken, the Secretary of the Interior, or his designee, shall conduct a thorough audit of the compliance with the reclamation law of the United States, specifically including this Act, by legal entities and individuals subject to such law. At a minimum, the Secretary shall complete audits of those legal entities and individuals whose landholdings or operations exceed 960 acres within 3 years. The Secretary shall submit an annual written report to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs. Such report shall summarize the legal entities and individuals audited, the results of such audits, and the actions taken by the Secretary to correct any instances of noncompliance with the reclamation law.

"(h) The provisions of section 205(c) are and have been applicable to all recordable contracts executed prior to October 12, 1982, and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked: *Provided,* That notwith-

standing the provisions of subsection (i), the Secretary shall not seek reimbursement for any amounts due under this subsection or section 205(c) which was due prior to the date of enactment of this subsection.

"(i) When the Secretary finds that any individual or legal entity subject to reclamation law, including this Act, has not paid the required amount for irrigation water delivered to a landholding pursuant to reclamation law, including this Act, he shall collect the amount of any underpayment with interest accruing from the date the required payment was due until paid. The interest rate shall be determined by the Secretary of the Treasury on the basis of the weighted average yield of all interest bearing marketable issues sold by the Treasury during the period of underpayment.".

(b) REVOCABLE TRUSTS. — Section 214 of the Reclamation Reform Act of 1982 (Public Law 97-293) is amended by inserting "(a)" after "214" and by adding the following new subsection at the end thereof:

"(b) Lands placed in a revocable trust shall be attributable to the grantor if —

"(1) the trust is revocable at the discretion of the grantor and revocation results in the title to such lands reverting either directly or indirectly to the grantor; or

"(2) the trust is revoked or terminated by its terms upon the expiration of a specified period of time and the revocation or termination results in the title to such lands reverting either directly or indirectly to the grantor.".

# APPENDIX J

## CURRENT INTERIOR RULE 11(i)(4) (1989); 43 CFR §426.11(i)(4) (1989)

(4) Water rates for land under extended recordable contracts. Land under recordable contract may continue to receive irrigation water deliveries at the non-full-cost rate for the original disposition period of the recordable contract. The rate for irrigation water deliveries to land under recordable contract during the extended contract period shall be determined as follows:

(i) For land under recordable contract owned by qualified and limited recipients, the non-full-cost rate shall apply until the date 18 months after the date the Secretary resumes the processing of excess land sales, or until the extended contract period expires, whichever occurs first, and after the date 18 months from the date the Secretary resumes the processing of excess land sales, water deliveries shall be made at the full-cost rate through the effective termination date of the extended recordable contract.

(ii) For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate described in § 426.7(f)(1) commencing December 23, 1987, through the effective termination date of the extended recordable contract.

# APPENDIX K

# SELECTED EXCERPTS OF JUNE 5, 1963 CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE

THIS CONTRACT, made this 5th day of June, 1963, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts mandatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and the WESTLANDS WATER DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Fresno, California,

WITNESSETH, That:

## EXPLANATORY RECITALS

WHEREAS, the United States is constructing and operating the Federal Central Valley Project for the purpose, among others, of furnishing water for irrigation, municipal, domestic, and other beneficial uses; and

WHEREAS, the United States is constructing the San Luis Unit of the Federal Central Valley Project which will be operated and used, in part, for the furnishing of water to the District pursuant to the terms of this contract; and

WHEREAS, the United States is providing an interceptor drain designed to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project; and

WHEREAS, investigations of the District lands and present water supply indicate that irrigated and irrigable lands within the boundaries of the District are at present in need of additional water for irrigation and certain areas have a potential need of water for irrigation, that ground water underlying the District is seriously depleted and in need of replenishment, and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed and to be constructed by the United States; and

WHEREAS, the District desires to contract, pursuant to the Federal reclamation laws and the laws of the State of California, for the furnishing by the United States of a supplemental water supply from the Project and for drainage service by means of the interceptor drain for which the District will make payment to the United States upon the basis, at the rate, and pursuant to the conditions hereinafter set forth; and

WHEREAS, investigations of the streamflow in the Sacramento River, the Trinity River, the American River, the San Joaquin River, and their tributaries indicate that there will be available for furnishing to the District from the San Luis Unit an additional water supply for surface diversion and direct application for irrigation and directly or indirectly to replenish depleted ground waters underlying the District;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is hereby mutually agreed by the parties hereto as follows:

## DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Contracting Officer", shall mean the Secretary of the United States Department of the Interior or his duly authorized representative:

(b) "Project" shall mean the Federal Central Valley Project, California, of the Bureau of Reclamation;

(c) "San Luis Unit" shall mean the facilities constructed pursuant to the Act of June 3, 1960 (74 Stat. 156);

(d) "interceptor drain" shall mean the physical works constructed by the United States pursuant generally to the Act of June 3, 1960 (74 Stat. 156), in order to meet the drainage requirements of the area served by the San Luis Unit which have been calculated to be one hundred and fifty thousand (150,000) acre-feet per year at a maximum rate of flow of two hundred and fifty (250) cubic feet per second. Such physical works shall not include those facilities necessary for the collection, conveyance, and discharge of drain water for disposal by the interceptor drain;

(e) "initial delivery date" shall mean the date announced by the Contracting Officer when water from the San Luis Unit first will be available for furnishing by the United States pursuant to this contract;

(f) "year" shall mean the period January 1 through December 31;

(g) "newly irrigated land" shall mean land that has not produced an irrigated crop during the five (5) years immediately previous to the initial delivery date;

(h) "agricultural use" shall mean use of water primarily in the commercial production of agricultural crops or livestock including domestic use incidental thereto on tracts of land operated in units of two (2) acres or more.

## TERM OF CONTRACT

2. This contract shall be effective on the date first hereinabove written and shall remain in effect for a period of forty (40) years commencing with the year in which the earliest initial delivery date of the long-term contracts for water service from the San Luis Unit shall occur: *Provided,* That if within five (5) years commencing with the year in which the initial delivery date of this contract occurs the District has not constructed distribution facilities of adequate capacity to serve all of the irrigable lands of the District, this contract shall at the option of the Contracting Officer terminate on the last day of December in said 5th year, except that if such facilities are under construction at the end of said period the Contracting Officer may, at his option, extend said period from year to year to permit completion of said facilities: *Provided further,* That under terms and conditions mutually agreeable to the parties hereto, renewals of this contract for furnishing water for agricultural use may be made for successive periods not to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract: *And provided further,* That upon written request by the District of the Secretary not later than one

(1) year prior to the expiration of this contract, whenever, account being taken of the amount then credited to the costs of construction of water supply works allocated to irrigation, the remaining amount of costs so allocated which is properly assignable for ultimate return by the District as established by the Secretary of the Interior pursuant to (3) of Section 1 of Public Law 643 (70 Stat. 483) probably can be repaid to the United States within the term of a contract under subsection (d), Section 9 of the 1939 Reclamation Project Act (53 Stat. 1187), this contract for the furnishing of water for agricultural use may be converted to a contract under said subsection (d) upon terms and conditions mutually agreeable to the United States and the District.

WATER TO BE FURNISHED TO DISTRICT — USE OF INTERCEPTOR DRAIN

3. (a) Each year for a period of five (5) years, commencing with the year in which the initial delivery date occurs, the United States shall furnish to the District and the District each such year shall accept and pay, as provided in Article 6 hereof, for water from the San Luis Unit in the quantities specified in the schedule or any revision thereof submitted by the District in accordance with subdivision (a) of Article 4 hereof for each such year: *Provided,* That the United States shall not be obligated to furnish more than one million eight thousand (1,008,000) acre-feet of water during any such year.

(b) Commencing with the 6th year and continuing through the 15th year the United States shall furnish to the District and the District shall accept and pay for, as provided in Article 6 hereof, four hundred thousand (400,000) acre-feet of water annually: *Provided,* That the District may at any time or times during the period

described by this subdivision, by written notice furnished to the United States in advance, increase the quantity of water the United States shall furnish to the District and the District shall accept and pay for annually during said period, but in no event shall said annual quantity for the 6th year through the year 1979 exceed one million eight thousand (1,008,000) acre-feet and for the period commencing with the year 1980 and extending through the 15th year exceed seven hundred and eighty-three thousand (783,000) acre-feet plus such additional quantity as may be determined pursuant to subdivision (c) hereof. At any time during said period, the submission and approval of a schedule or any revision thereof pursuant to subdivision (a) of Article 4 hereof for water in excess of the quantity the District is required to accept and pay for during that year shall constitute such a written notice.

(c) The maximum of seven hundred and eighty-three thousand (783,000) acre-feet of water to be furnished to the District pursuant to subdivisions (b) and (d) hereof has been computed on the premise that be eliminating overdraft a safe yield of two hundred and twenty-five thousand (225,000) acre-feet of water of usable quality will be available each year for pumping within the District from the deep underground beneath what is generally referred to as the Corcoran clay at an estimated average depth of three hundred (300) feet. Prior to January 1, 1980, the United States and the District by joint studies shall review the validity of this estimate based on conditions existing after the initial delivery date. In the event, as a result of such joint studies, the parties determine upon a safe yield in a quantity less than two hundred and twenty-five thousand (225,000) acre-feet, the quantity of water to be furnished annually to the District pursuant to subdivisions (b) and (d) hereof shall then be increased by the difference

between said yield of two hundred and twenty-five thousand (225,000) acre-feet and the safe yield as determined by the joint studies: *Provided, however,* That such increase shall not exceed one hundred and seventeen thousand (117,000) acre-feet.

(d) Commencing the 16th year and each year thereafter during the remainder of the term of this contract, the United States shall furnish to the District for use on its eligible lands and the District shall accept and pay for, as provided in Article 6 hereof, seven hundred and eighty-three thousand (783,000) acre-feet of water plus such additional quantity as may be determined pursuant to subdivision (c) hereof. If in any year during such period the District is unable to so use any part of such total quantity of water, the United States and the District by mutual agreement may reduce, by a quantity equal to that which the District was unable to so use, the quantity of water which the United States is obligated to furnish and the District is obligated to accept and pay for during the remainder of the term of this contract.

(e) If in any year after the Contracting Officer has approved a schedule or any revision thereof submitted by the District the United States is unable to furnish any portion of the water in the quantities and at the times requested in the schedule and the District does not elect to receive and does not receive such water at other times during such year, the District shall be entitled to an adjustment as provided in Article 7.

(f) The right to the beneficial use of water furnished to the District pursuant to the terms of this contract and any renewal hereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any such renewal.

(g) Drainage facilities of the District constructed in accordance with Article 13 hereof may be connected

to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between the District and the United States.

* * *

## RATE AND METHOD OF PAYMENT FOR WATER — DRAINAGE SERVICE

6. (a) Before December 15 of each year the Contracting Officer shall notify the District in writing of the rate of payment to be made by the District for water which the District is required to accept and pay for during the ensuing year pursuant to the provisions of Article 3 hereof. The rate so announced may not be in excess of Eight Dollars ($8) per acre-foot and shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50). The United States shall notify the District in writing when the interceptor drain becomes available for service. The drainage service component shall be included in the rate of payment beginning with the year following the date the District is notified that such service is available.

(b) The District shall make payments to the United States each year at the rate fixed as provided in subdivision (a) of this article for the quantity of water which the District is required to accept and pay for during such year pursuant to the provisions of Article 3 hereof. The District shall pay one-half (1/2) of the amount payable for said water to be furnished for the year before January 1 and shall pay the remainder of the amount payable for said water at the time the quantity of water furnished to the District equals the quantity for which payment has been made but in no event later than

July 1 or such other later date or dates of the respective year as may be specified by the Contracting Officer in a written notice to the District. Water requested by the District in excess of the quantity it is required to accept and pay for that year shall be paid for in full at the time or times such requests are made.

(c) In the event the District is unable, fails, or refuses to accept delivery of the quantities of water available for delivery to and required to be accepted by it pursuant to this contract, or in the event the District in any year during the periods described in subdivisions (b) and (d) of Article 3 hereof fails to submit a schedule for delivery as provided in subdivision (a) of Article 4 hereof, said inability, failure, or refusal shall not relieve the District of its obligation to pay for such water and the District agrees to make payment therefor in the same manner as if said water had been delivered to and accepted by it in accordance with this contract.

* * *

## AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT — TAXABLE LAND

14. The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

## ALL BENEFITS CONDITIONED UPON PAYMENT

15. Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void, or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

* * *

## LAND NOT TO RECEIVE WATER FURNISHED TO DISTRICT BY UNITED STATES UNTIL OWNERS THEREOF EXECUTE CERTAIN CONTRACTS

23. (a) No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided. No sale of any excess lands shall carry the right to receive water made available pursuant to this contract unless and until the purchase price involved in such sale is approved by the Contracting Officer and upon proof of fraudulent representation as to the true consideration involved in such sales the United States may instruct the District by written notice to refuse to furnish any water subject to this contract to the land involved in such fraudulent sales, and the District thereafter shall not furnish said water to such lands until such written notice is withdrawn.

(b) If Project water furnished to the District pursuant to this contract reaches the underground strata of excess land owned by a large landowner, as defined in subdivision (a) or Article 25 hereof, who has not executed a recordable contract and the large landowner pumps such Project water from the underground, the

District will not be deemed to have furnished such water to said lands within the meaning of this contract if such water reached the underground strata of the aforesaid excess land as an unavoidable result of the furnishing of Project water by the District to nonexcess lands or to excess lands with respect to which a recordable contract has been executed.

## VALUATION AND SALE OF EXCESS LANDS

24. (a) The value of the excess irrigable lands within the District held in private ownership of large landowners as defined in the next succeeding article hereof, for the purposes of this contract, shall be appraised in a manner to be prescribed by the Secretary. At the option of a large landowner, however, the value of such land may be appraised, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall be designated by the Secretary and one shall be designated by the District and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, the Presiding Justice of the Fifth District Court of Appeal of the State of California shall be requested to designate the third appraiser.

(b) The following principles shall govern the appraisal:

(i) No value shall be given such lands on account of the existing or prospective possibility of securing water from the Project;

(ii) The value of improvements on the land at the time of said appraisal shall be included therein, but shall also be set forth separately in such appraisal.

(c) The excess land or any large landowner shall be reappraised at the instance of the United States or at the request of said landowner. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal.

(d) Any improvements made or placed on the appraised land after the appraisal hereinabove provided for prior to sale of the land by a large landowner shall be appraised in like manner.

(e) Excess irrigable lands sold by large landowners within the District shall not carry the right to receive water made available pursuant to this contract for such lands and the District agrees to refuse to furnish such water to lands so sold until, in addition to compliance with the other provisions hereof, a verified statement showing the sale price upon any such sale shall have been filed with the District and said sale price is not in excess of the appraised value fixed as provided herein.

(f) The District agrees to take all reasonable steps requested by the Contracting Officer to ascertain the occurrence and conditions of all sales of irrigable land of large landowners in the District made subsequent to the execution of this contract and to inform the United States concerning the same.

(g) A true copy of this contract, of each recordable contract executed pursuant to this article and Articles 23 and 25 hereof, and of each appraisal made pursuant thereto shall be furnished to the District by the United States and shall be maintained on file in the office of the District and like copies in such offices of the Bureau of Reclamation as may be designated by the Contracting Officer and shall be made available for examination during the usual office hours by all persons who may be interested therein.

## EXCESS LANDS

25. (a) As used herein the term "excess land" means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any single person; or in excess of three hundred and twenty (320) acres held in the beneficial ownership of husband and wife jointly, as tenants in common or by the entirety, or as community property; the term "large landowners" means an owner of excess lands and the term "nonexcess land" means all irrigable land within the District which is not excess land as defined herein.

(b) Each large landowner as a further condition precedent to the right to receive water made available pursuant to this contract for any of his excess land shall:

(i) Before any water is furnished by the District to his excess land, execute a valid recordable contract in form prescribed by the United States, agreeing to the provisions contained in this article and Articles 23 and 24 hereof and agreeing to dispose of his excess land in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract and agreeing further that if said land is not so disposed of within said period of ten (10) years, the Secretary shall have the power to dispose of said land at the appraised value thereof fixed as provided herein or such lower price as may be approved by the owner of such land, subject to the same conditions on behalf of such large landowner; and the District agrees

that it will refuse to furnish said water to any large landowner other than for his nonexcess land until such owner meets the conditions precedent herein stated;

(ii) Within thirty (30) days after the date of notice from the United States requesting such large landowner to designate his irrigable lands within the District which he desires to designate as nonexcess lands, file in the office of the District, in duplicate, one copy thereof to be furnished by the District to the Bureau of Reclamation, his written designation and description of lands so selected to be nonexcess land and upon failure to do so the District shall make such designation and mail a notice thereof to such large landowner, and in the event the District fails to act within such period of time as the Contracting Officer considers reasonable, such designation will be made by the Contracting Officer, who will mail a notice thereof to the District and the large landowner. The large landowner shall become bound by any such action on the part of the District or the Contracting Officer and the District will furnish said water only to the land so designated to be nonexcess land. A large landowner may with the consent of the Contracting Officer designate land other than that previously designated as nonexcess land: *Provided,* That an equal acreage of the land previously designated as nonexcess shall, upon such new designation, become excess land thereafter subject to the provisions of this article and Articles 23 and 24 of this contract and shall be described in an amendment of such recordable contract as may have been executed by the

large landowner in the same manner as if such land had been excess land at the time of the original designation.

# APPENDIX L

# EXEMPLAR OF RECORDABLE CONTRACT

Book 987 Page 928

For Corporations

Recorded at request of Bureau of Reclamation At 25 min. past 11 a.m. April 17, 1972
Fee - $13.00
Vol. 987 Official Records, P 928
Kings County, State of California
Beatrice Hawes, Auditor and Recorder
by Kathleen Webb, Deputy

R.O Draft 2/20-1964
Rev. R.O. 7/9-1968
(Westlands Water District)
RC 772

Contract No.
14-06-200-5783A

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

## AGREEMENT PERTAINING TO SALE OF EXCESS LANDS

THIS AGREEMENT, made this 21st day of January, 1972, under the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled "the United States", represented by the Secretary of the Interior or his duly authorized representative, and BOSTON RANCH COMPANY, a California corporation, herein styled "the Landowner";

WITNESSETH THAT:

WHEREAS, pursuant to the Federal reclamation laws, the United States and the Westlands Water District have entered into a contract herein referred to as the District Contract, dated June 5, 1963, a copy of which is on file in the office of said District in the City of Fresno, County of Fresno, California, of which articles 23, 24, and 25 provide for the execution of certain contracts by owners of irrigable excess land within the District and the valuation and conditions of sale of such land, and of article 23 which, among other things, provides in part as follows:

> No water made available pursuant to this contract shall be furnished to any excess lands as defined in article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided.

WHEREAS, the Landowner is the owner of certain land situated in the County of Kings, California, and within the territorial limits of and incorporated into and as a part of, the District; and

WHEREAS, the Landowner, pursuant to article 25 of the District Contract, has designated as nonexcess

land a portion of the aforesaid land and has filed with the District a written description thereof;

NOW, THEREFORE, in consideration of the direct and indirect benefits to be derived under the terms of the District Contract, as implemented by this agreement, by all of the lands of the Landowner within the District, and as an inducement to the United States to make water and distribution facilities available to the District for the excess land of the Landowner, the Landowner agrees and covenants for itself, its executors, administrators, heirs, successors, and assigns, all of which agreements and covenants are and each of them hereby is made a charge upon the excess land of the Landowner to run with the title to the said excess land, as follows:

1. Each term defined in the District Contract shall, when used herein, have the same meaning as that which it has when used in the District Contract.

2. The Landowner is the owner of excess land situated in Kings County, California, and particularly described as follows:

PARCEL ONE: All of Section Eighteen (18), Township Nineteen (19) South, Range Nineteen (19) East, Mount Diablo Base and Meridian, containing an area of 639 acres, more or less.

PARCEL TWO: The west half (W 1/2), the north half of the northeast quarter (N 1/2 NE 1/4), and the south half of the southeast quarter (S 1/2 SE 1/4) of Section Nineteen (19), Township Nineteen (19) South, Range Nineteen (19) East, Mount Diablo Base and Meridian, containing an area of 474 acres, more or less.

PARCEL THREE: The Southwest quarter (SW 1/4) and the South half of the Northwest quarter (S 1/2 NW 1/4) of Section Thirty (30), Township Nineteen (19) South, Range Nineteen (19) East, Mount Diablo Base and Meridian, BUT EXCEPTING THEREFROM the North

510 feet of the West 671 feet of the South half of the Northwest quarter (S 1/2 NW 1/4) of said Section Thirty (30); ALSO EXCEPTING THEREFROM that portion thereof lying within the following described parcel of land: Beginning at the northeast corner of the northwest quarter (NW 1/4) of said Section Thirty (30); thence along the east line of the northwest quarter (NW 1/4), South 0°01'30" West, 2251 feet; thence North 89°58'30" West, 370 feet; thence North 0°01'30" East, 960 feet; thence South 89°58' 30" East, 330 feet; thence North 0°01'30" East, 1291 feet to a point in the north line of said Section Thirty (30); thence along said north line, South 89°58'30" East, 40 feet to the point of beginning; containing an area of 224 acres, more or less, after said exceptions.

PARCELS ONE, TWO and THREE containing a combined area of 1,337 acres, more or less.

Each of said parcels being subject to existing rights of way in favor of the public or third parties for highways, roads, railroads; telegraph, telephone and electrical transmission lines and canals, laterals, ditches, flumes, siphons and pipelines on, over and across said premises.

Excepting and reserving as to each of said parcels all oil, gas and minerals and other hydrocarbon substances in and under said land, together with the right of ingress and egress thereto, as necessary or desirable, for the exploration, development and exploitation of all such reserved rights; *Provided*, that upon exercise of any of said rights of ingress and egress for exploration, development and exploitation the owner of said mineral rights shall fully indemnify the surface owner for any and all damages or losses resulting therefrom or caused thereby. This indemnification provision shall be binding upon the landowner herein, his executors, administrators, heirs, and assigns, and any conveyance of mineral rights by the

landowner herein shall specifically contain such a provision for indemnification.

3. The appraised value of said excess land within the meaning of the District Contract and this contract shall be determined in a manner to be prescribed by the Secretary of the Interior. At the option of the Landowner, however, the said value may be determined, subject to the approval thereof by the Secretary, by three appraisers, one designated by the United States, one designated by the District, and the third designated by the first two, or upon their failure to agree by the presiding Justice of the Fifth District Court of Appeals of the State of California. Said excess land shall be appraised at its fair market value, but in the appraisal no value shall be given such land on account of the existing or prospective availability of water or service from the Central Valley Project. The value of the improvements on the land at the time of appraisal shall be included therein, but shall also be set forth separately in such appraisal.

4. The Landowner agrees that the land described in article 2 hereof shall be subject to the terms of this contract and the terms of articles 23, 24, and 25 of the District Contract and said articles are hereby made a part of this agreement by reference.

5. All rights of the Landowner to receive Project water for its excess land shall be subject to the provisions of the District Contract and this contract.

6. The Landowner agrees that if and when any or all of the land described in article 2 hereof is sold by or for it, said land will be sold at prices not exceeding the appraised value thereof as fixed pursuant to the procedure set forth in article 3 or as said appraised value may be modified as hereinafter provided, plus the appraised value of the crops growing on said land at the date of sale. The value of crops growing on the land at the date

of sale shall be included but shall be set forth separately in the appraisal.

7. If an appraisal has been made pursuant to article 3 prior to the sale of the land described in article 2 of this agreement, either the Landowner or the United States may require that said land or any part thereof be again appraised at any time prior to the sale thereof, and such appraisals shall be made as provided in article 3 hereof. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal. The value established by any new appraisal shall supersede the value established by the existing appraisal on the date of the receipt of a registered letter to the Landowner notifying it of said new appraisal.

8. None of the excess land described in article 2 hereof shall be entitled to receive water nor shall service be made available to such land pursuant to the District Contract, except while owned by the Landowner, unless the same shall have been sold to a person who, as the owner of such land, is qualified as a nonexcess landowner to receive Project water under the provisions of the Federal reclamation laws, the District Contract, and this agreement in full compliance with the provisions thereof.

9. When any of the excess land covered by this agreement shall have been transferred in accordance with the provisions hereof to a person who, as the owner of such land, qualifies as a nonexcess landowner under the District Contract, the land so transferred shall thereupon be subject to and governed by the terms and provisions of said District Contract applicable to nonexcess lands.

10. The terms "sold" and "transferred", as used in articles 6, 8, and 9 of this agreement, include conveyance by way of bona fide gift, dividend, or otherwise,

if the consideration, if any, received by the Landowner does not exceed the appraised value as determined pursuant to article 3 hereof or the reappraised value as determined pursuant to article 7 hereof.

11. The Landowner hereby irrevocably makes, constitutes, and appoints the Secretary of the Interior, United States Department of the Interior, its true and lawful attorney for it in his name, place, and stead, to sell and transfer at any time following the expiration of a period of ten (10) years immediately following the date of execution of this agreement, all of its then right, title, and interest in and to any or all of the excess land described in article 2 hereof, owned by the Landowner, beneficially or otherwise, by such instrument as may be agreed upon between the Secretary and any other parties: *Provided*, That such sale shall not be made at a price which is less than the appraised value as fixed pursuant to the procedure set forth in article 3 hereof, or such appraised value as amended pursuant to article 7 hereof: *Provided further*, That such sale of said excess land shall be only for cash or upon terms satisfactory to the Landowner. The Landowner gives and grants irrevocably unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done to transfer title to said property, as fully to all intents and purposes as the Landowner might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do, or cause to be done, by virtue of these presents.

12. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, this agreement shall no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other

provisions of the Federal reclamation laws, the United States agrees, at the option of the Landowner, to negotiate amendments of the appropriate articles of this agreement, all consistently with the provisions of such repeal or amendment.

13. In the event that the District contract shall not become effective, or, through no breach on the part of the District, should terminate prior to the expiration of the term thereof, then this agreement shall also terminate: *Provided*, That any recordable contract relating to the excess land described in article 2 hereof shall similarly provide that the power of attorney conferred upon the Secretary for the disposal of said land shall become effective ten (10) years from the date of the execution of this recordable contract: *Provided further*, That the computation of the ten-year period prescribed in article 11 hereof shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ R. J. Pafford Jr
Regional Director, Region 2
Bureau of Reclamation

BOSTON RANCH COMPANY,
a California corporation

By /s/
Vice President

/s/ John C. Sterling
Secretary

(SEAL)

# APPENDIX M

# EXEMPLAR OF AMENDATORY RECORDABLE CONTRACT

CONTRACT NO. 14-06-200-5783A
AMENDATORY

Recorded in Official Records of
Kings County, California
at ____ Min. Past 12 M
NOV 5 1984
Fee 5
Joan L. Bullock
County Clerk and Recorder

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AMENDATORY AGREEMENT PERTAINING TO SALE OF EXCESS LAND EXTENDING DISPOSITION PERIOD FOR SALE OF LAND

This AMENDATORY AGREEMENT, made this 14th day of August, 1984, under the provisions of the Reclamation Reform Act of 1982, and acts amendatory thereof or supplementary thereto, between the UNITED STATES OF AMERICA, hereinafter referred to as the United States, represented by the Secretary of the Interior or his duly authorized representative, and Boston Ranch Compny referred to as the Landowner.

WITNESSETH, That:

WHEREAS, on January 21, 1972, the United States and the Landowner entered into Contract No. 14-06-200-5783A recorded in the official records of Kings County, Book 987, Page 928, hereinafter referred to as

the Recordable Contract providing for the sale of excess land owned by the Landowner in the Westlands Water District; and

WHEREAS, it is the desire of the United States to amend the maturity date of said Recordable Contract;

NOW, THEREFORE, in order to make such amendment, the parties hereto agree as follows:

1. Article 11 of the Recordable Contract is hereby amended to read as follows:

11. The Landowner hereby irrevocably makes, constitutes, and appoints the Secretary of the Interior, United States Department of the Interior, his true and lawful attorney for him in his name, place, and steady, to sell and transfer at any time following the expiration of this contract on February 16, 1990, all of his then right, title, and interest in and to any or all of the excess land described in article 2 hereof, owned by the Landowner, beneficially or otherwise, by such instrument as may be agreed upon between the Secretary and any other parties: *Provided*, That such sale shall not be made at a price which is less than the appraised value as fixed pursuant to the procedure set forth in article 3 hereof, or such appraised value as amended pursuant to article 7 hereof: *Provided further*, That such sale of said excess land shall be only for cash or upon terms satisfactory to the Landowner. The Landowner gives and grants irrevocably unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done to transfer title to said property, as fully to all intents and purposes as the Landowner might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do, or cause to be done, by virtue of these presents:

2. All references in the Recordable Contract to Article 11 thereof shall refer to such article as herein amended.

3. In all other respects, the Recordable Contract shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

Acting /s/ Neil W Schild
Regional Director, Mid-Pacific Region
Bureau of Reclamation

Boston Ranch Company
Landowner

By /s/ J W Boswell
James W. Boswell, President

By /s/ John C. Sterling
John C. Sterling, Secretary

# APPENDIX N

# SELECTED PARAGRAPHS OF DECEMBER 30, 1986 JUDGMENT ENTERED IN *BARCELLOS AND WOLFSEN, INC., et al., v. WESTLANDS WATER DISTRICT, et al.*, E.D. Cal. No. CV 79-106-EDP

3. Enforcement of Judgment.

A party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. Either of these proceedings against the Federal parties shall, except as otherwise specifically limited by Paragraphs 6.1, 12.1.1, 12.1.2 and 12.3 of this Judgment, be for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment; *provided,* that any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this Judgment, or (iii) it is otherwise a subject of this Judgment. A motion in these present actions to obtain relief from an alleged violation of this Judgment may be filed only after 60 days prior written notice to all other parties that such a motion will be filed if another party or other parties fail or refuse to perform in the manner described in said notice. The parties entitled to file such a motion and to receive such prior written notice thereof in these present actions shall be limited to the Area representatives provided for in Paragraph 22 below (who shall represent the interests of the class members within the areas they represent), the United States, the District, and any landowners or water users who have heretofore

appeared in these present actions on their own behalf. The parties shall not seek judicial enforcement of this Judgment in any other manner than described above. During the term of this Judgment, each party shall perform all acts it is obligated hereunder to perform. This Judgment shall not alter or impair, or deprive any party of, any existing legal rights or confer on any party any right except as expressly provided herein.

4. 1963 Contract.

4.1. Beginning the first day of the month after this Judgment is entered, the District and the United States shall perform the 1963 Contract; *provided*, that the District waives the right to make payment for water requested and delivered under Articles 4(c) or 8 of said contract at the rate provided in Article 6 thereof so long as the rate charged for said water does not exceed the applicable Central Valley Project water rate as of the date of delivery; *provided further*, that to facilitate and implement the existing water conservation policies of the United States, (a) Article 1(f) of said contract shall be revised to state: " 'year' shall mean the period commencing March 1 of each year through the last day of February of the following year"; (b) Article 6(b) of said contract shall be revised by substituting "March 1" for "January 1" and "September 1" for "July 1"; and (c) notwithstanding the provisions of Article 3(d) of said contract, the quantity of water the United States shall be obligated to furnish, and the District to pay for, pursuant to Article 3 of said contract during the period commencing March 1, 2007, and ending December 31, 2007, shall be 811,000 acre-feet. The 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service by the United States as specified therein.

4.2. The District acknowledges that it entered into the 1963 Contract for the benefit of Areas 1A and 1B and the lands therein. The District will enforce the prior rights of said areas to the benefits of said contract and acknowledges that water users in Areas 2A and 2B may purchase water under the 1963 Contract not purchased by water users in Areas 1A and 1B as provided in this Judgment. To the extent that water under the 1963 Contract is purchased by a water user in Area 2A or Area 2B, the District shall collect from such water user and pay the United States for such water the water service rate set forth in Article 6(a) of the 1963 Contract, Paragraph 4.4 below or 4.5.4 below, whichever is applicable, plus a $0.50 per acre foot drainage service charge, until such water user becomes entitled to water service pursuant to the long-term contract described in Paragraph 12.1.1 below, whereupon the contracting improvement district of the District shall collect from such water user and pay the United States for such water the applicable rates set forth in such long-term contract.

4.3. The District shall not enter into any contract which would modify the rights and obligations under the 1963 Contract prior to 2008, except with the concurrence of Area I as provided in Paragraph 22.5 below; *provided,* that such concurrence may be obtained only by lack of objection by Area I representatives and not by an advisory election under said paragraph.

4.4. The agricultural water service component of the rates to be paid to the United States for water delivered under Article 3 of the 1963 Contract to lands which become subject to the Discretionary Provisions of the 1982 Act shall be the higher of (a) $7.50 per acre foot or (b) the appropriate rate as of the date of delivery established pursuant to the 1982 Act.

* * *

6.3. Drainage Service Facilities heretofore constructed by the United States are and, unless hereafter otherwise provided by statute, will be a work or works "connected with water supply and allocated to irrigation" and not any "irrigation water distribution work" as those terms are used in Section 9(e) of the 1939 Act. Section 9(d) of the 1939 Act does not prohibit the Federal Parties from presently providing water service or drainage service under the 1963 Contract. Agreement by the District to repay the Costs of Construction by the United States of Drainage Service Facilities under said Section 9(d) is not a condition precedent to the United States' or the Federal Parties' duty to perform any term of the 1963 Contract. A per acre foot drainage service charge is a legal and valid method of repayment of the Costs of Construction by the United States of Drainage Service Facilities.

6.4. Because they are the drainage counterpart of the main conveyance facilities of the San Luis Unit, Drainage Service Facilities authorized by the 1960 Act are not a part of "distribution systems and drains" as that term is used in Section 8 of the 1960 Act.

7. Drainage Trust Fund.

7.1. To aid in funding costs of Drainage Service Facilities and to encourage and expedite United States' construction or acquisition thereof, beginning the first day of the month after this Judgment is entered, the District shall establish, maintain and use the Drainage Trust Fund exclusively for the purposes and in accordance with the terms and conditions specified in Paragraphs 7.1.1 through 7.1.9 below.

7.1.1. Beginning the second year after this Judgment is entered, the District shall levy $5 million per year by assessments on all lands within the District, and deposit

the money collected into the Drainage Trust Fund. Said $5 million per year may be increased by the District with Area I and Area II concurrence as provided in Paragraph 22.5 below. To the extent necessary to meet the payment obligations from the Drainage Trust Fund under Paragraph 7.1.4 and 7.1.7 below, the District shall borrow and deposit additional money therein. The District may terminate the collection and deposit of said $5 million per year when the District Board of Directors finds and determines, based on reasonable projections of said payment obligations and of interest earned on the money in the Drainage Trust Fund, that there is sufficient money therein to meet said payment obligations.

7.1.2. Each year, the per acre average of said assessments levied by the District within (a) the territory encompassing Areas 1A and 1B and lands adjacent thereto annexed to the District after June 29, 1965, shall be 1.7 times the per acre average of said assessments within (b) the territory encompassing Areas 2A and 2B and lands adjacent thereto annexed to the District after June 29, 1965. However, within each of the territories described in (a) and (b) in the preceding sentence, the District shall apportion said assessments as authorized by law, including but not limited to Water Code Sections 36577 and 36578.

7.1.3. The District Treasurer shall be trustee of the Drainage Trust Fund and shall make the payments required under Paragraphs 7.1.4 and 7.1.7 below. The trustee shall invest the money in the Drainage Trust Fund to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. The interest earned on said investment shall become part of the Drainage Trust Fund.

7.1.4. For each Federal fiscal year (hereinafter "fiscal year") the trustee shall pay the United States from the

Drainage Trust Fund, in accordance with the procedure and to the extent stated in Paragraph 7.1.5 below, a progress payment of 35 percent of the estimated Costs of Construction by the United States during that fiscal year of Drainage Service Facilities. As to facilities constructed or acquired by the United States for drainage service which have capability to serve others in addition to capability as Drainage Service Facilities, the 35 percent progress payment to be paid from the Drainage Trust Fund shall be reduced to reflect the District's proportionate benefits from such facilities. The required progress payment to the United States from the Drainage Trust Fund for any fiscal year shall not exceed $500,000 per facility for design and preparation of plans and specifications and $15 million for total Costs of Construction of all facilities. The progress payments in the aggregate shall not exceed $100 million. Accumulated payments from the Drainage Trust Fund under Paragraph 7.1.7 below shall be credited toward meeting both the District's fiscal year and aggregate progress payment obligations.

7.1.5. By July 1 of each year, the Federal Parties shall advise the trustee of the estimated Costs of Construction to be incurred by the United States during each quarter of the upcoming fiscal year. The trustee shall pay the United States the required portion of said estimated quarterly cost on October 1, January 1, April 1, and July 1 of that fiscal year, to the extent that the Congress has appropriated federal funds sufficient to cover the remainder of such estimated costs. In the event the trustee does not make such payment when due, the Federal Parties shall have the right to withdraw the required amount of money from the Drainage Trust Fund on behalf of the United States. At the end of each quarter, if the actual Costs of Construction incurred by the United States during such quarter were less than the

estimated costs, there shall be an appropriate credit against the next quarterly progress payment obligation from the Drainage Trust Fund.

7.1.6. On October 1 and April 1 of each year, or at other times as agreed in writing by the Federal Parties and the trustee of the Drainage Trust Fund, the trustee shall provide a statement to the Federal Parties specifying the amount of money in the Drainage Trust Fund.

7.1.7. Upon the District's request, the Trustee shall pay the District from the Drainage Trust Fund:

(a) (i) the Costs of Construction, both before and after the date of this Judgment, of Cost Effective and financially feasible Drainage Service Facilities constructed or acquired by the District and the cost of Cost Effective and financially feasible Drainage Reduction Programs implemented by the District either before or after the effective date of this Judgment, or (ii) the amounts needed to repay District funds, or the principal of money borrowed by the District, used either before or after the effective date of this Judgment to pay any of the foregoing costs;

(b) a maximum of $5 million which may be used for any one or more of the following: (i) to pay the costs of studies and investigations of drainage problems and solutions, either before or after the effective date of this Judgment; (ii) to repay District funds or the principal of money borrowed by the District to pay the costs described in (i) immediately above; (iii) to pay the interest cost of money borrowed by the District, either before or after the effective date of this Judgment, to pay the Costs of Construction (not exceeding a total of $30 million) of Drainage Service Facilities constitut-

ing "Alternative Means" under the agreement between the District and the U.S. Department of the Interior dated April 3, 1985 (a copy of which is attached hereto as Exhibit H); and

(c) the amounts needed to repay the principal of money borrowed and deposited into the Drainage Trust Fund by the District as required by Paragraph 7.1.1 above.

The District shall consult with the Federal Parties before incurring any Costs of Construction of Drainage Service Facilities or any costs of implementing Drainage Reduction Programs, or borrowing any money to pay such costs. Construction or acquisition by the District of Drainage Service Facilities or implementation by the District of Drainage Reduction Programs paid for with money from the Drainage Trust Fund shall reduce, by the amount of the design capacity of such facilities or by the design amount of drainage reduction resulting from such programs, the legal obligation of the United States to the District, if any, to construct or acquire Drainage Service Facilities or provide drainage service.

7.1.8. The money then deposited in the Drainage Trust Fund, including accumulated interest, shall be released to the District free of any obligation to the United States if and when any of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 below occurs.

7.1.8.1 The Federal parties do not develop, adopt, and submit to the District the Drainage Plan by December 31, 1991.

7.1.8.2. The Congress has not authorized the appropriation of funds for the construction or acquisition of at least one Drainage Service Facility described in the Drainage Plan by December 31, 1993.

7.1.8.3. The Federal Parties have not commenced actual construction or acquisition of at least one

Drainage Service Facility described in the Drainage Plan by December 31, 1996.

7.1.8.4. After the authorization referred to in Paragraph 7.1.8.2, the Congress for any two consecutive fiscal years does not appropriate funds for construction or acquisition of Drainage Service Facilities.

7.1.8.5. After the Congress has appropriated funds for the construction or acquisition of Drainage Service Facilities, the Federal Parties do not diligently pursue construction or acquisition thereof.

7.1.8.6. The Federal Parties do not complete construction or acquisition of at least one Drainage Service Facility by the date provided in the Drainage Plan schedule.

7.1.8.7. The Federal Parties state that they will not develop or implement the Drainage Plan.

7.1.8.8. The Congress conditions future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in Paragraph 7.1.4 above, and the District, after 30 days written notice to its landowners and water users and opportunity for hearing, gives written notice to the Federal Parties that it desires release of the money as provided in Paragraph 7.1.8. Such notice to the Federal Parties shall be given within six months of the effective date of, and shall specify, the Act of Congress giving rise to the District's right to a release of such money.

7.1.9. Each of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.7 above may be waived or the time extended by written agreement between the Federal Parties and the District, with Area I and Area II concurrence as provided in Paragraph 22.5 below.

7.2. Upon release from the Drainage Trust Fund under Paragraph 7.1.8 above, the money not needed to discharge payment obligations previously incurred

pursuant to Paragraph 7.1.7 above shall be paid by the District as a refund to the landowners whose assessment payments were the original source of the money in amounts proportionate to such assessments.

7.3. Except as provided in Paragraph 7.3.2 below, on request of the District, the United States shall reimburse the District for the progress payments which were previously made by the District to the United States from the Drainage Trust Fund pursuant to Paragraph 7.1.4 above, plus Statutory Interest from the date each progress payment was made to the date on which the money in the Drainage Trust Fund is released to the District, with respect to any uncompleted Drainage Service Facility for which progress payments have been made if (i) for two consecutive fiscal years the United States has not incurred any Costs of Construction with respect to such facility and (ii) at the time of such request, the United States has not resumed and does not thereafter diligently continue to incur Costs of Construction of such facility. Such reimbursement shall be accomplished by credits against water service payments due from the District to the United States, commencing the first day of the month after the Drainage Trust Fund is released to the District, until the total progress payments made pursuant to Paragraph 7.1.4 above have been reimbursed, with Statutory Interest on the unreimbursed amount starting the first day of said month. Thereafter, the District shall be entitled to no further credit for said progress payments made pursuant to Paragraph 7.1.4 above.

7.3.1 Notwithstanding the credits provided for in Paragraph 7.3 above, (a) water users in the District shall pay the District for water service the same amounts of money as they would have been required to pay for water service in the absence of said credits, and (b) at the time payments for such water service would have

otherwise been made to the United States, the District shall deposit an amount of money equal to said credits into a special Assessment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of said Assessment Refund Account. The money deposited into the Assessment Refund Account plus the interest thereon shall be paid by the District periodically as soon as practicable as refunds to the landowners for the portion of their assessments not previously refunded from the released Drainage Trust Fund.

7.3.2. No reimbursement shall be made to the District pursuant to Paragraph 7.3 above of any progress payment previously made from the Drainage Trust Fund for any Drainage Service Facility if it is financially feasible for the District to complete construction and to operate and maintain such facility. In such event, the District shall have the right, but not the obligation, to complete the construction of, and to operate and maintain, such facility.

7.4. Unless and until one of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 above occurs, the parties shall not seek judicial relief based on any claim that the United States or the Federal Parties have any statutory, contractual or other obligation, or are violating any such obligation, to construct Drainage Service Facilities or to provide drainage service.

7.5. Beginning upon completion of construction or acquisition by the United States of any Drainage Service Facilities included in the Drainage Plan and continuing through December 31, 2007, the District shall pay the United States for drainage service, in addition to the $0.50 per acre foot drainage service charge under the 1963 Contract, a drainage service charge per acre foot of

Central Valley Project water delivered to the District sufficient, when combined with the $0.50 per acre foot charge, to cover the District's share of the operation and maintenance costs of such Drainage Service Facilities. Such additional charge shall be adjusted by the Federal Parties annually in subsequent years after payment begins by the same percentage as the change in the annual operation and maintenance costs of said Drainage Service Facilities; *provided,* that no increase in such charge shall be effective for any year unless written notice of the estimated increase is given by the Federal Parties to the District on or before September 1 of the previous year and written notice of the actual increase is given by the Federal Parties to the District on or before December 1 of the previous year. The United States shall credit the total drainage service charges collected, first, to payment of the District's share of the operation and maintenance cost of said Drainage Service Facilities and, second, to the District's share of the construction costs of said facilities.

7.6. During the duration of this Judgment, the District shall not pay a total of more than $100 million (exclusive of any interest other than the $5 million referred to in Paragraph 7.1.7(b) above) for Costs of Construction of Drainage Service Facilities and costs of implementing Drainage Reduction Programs by either or both the District and the United States. If, however, the United States and the District agree to an amount greater than $100 million and the Area I and Area II concurrences are obtained as provided in Paragraph 22.5, the District shall pay such additional amount.

7.7. Nothing in Paragraph 6 above or this Paragraph 7 shall be deemed to prevent the Congress from conditioning future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in this Judgment.

8. Refunds to District for Net Overpayments and Deposits.

The parties agree that, as a result of overpayments and underpayments by the District to the United States for water service since June 30, 1978, and deposits by the District to the Existing Trust Fund since January 1, 1982, the District is entitled to the money referred to in Paragraphs 8.1 and 8.2 below.

8.1. The entire amount in the Existing Trust Fund at the end of the month in which this Judgment is entered, including principal and interest, (which was a total of $37,960,287.75 as of February 28, 1986) shall be released to the District from said trust at the end of said month. As soon thereafter as possible, the money shall be used, first, for payment of court costs and attorneys' fees and expenses as provided in Paragraph 19 below and, second, to refund water users in the District having net credits as provide in Paragraph 9 below.

8.2. As of the end of the month in which this Judgment is entered, the District shall be entitled to a refund from the United States of a sum which was $6,900,091.00 as of February 28, 1986, as shown in Exhibit I attached hereto, which amount includes Statutory Interest. Said refund amount shall be adjusted to reflect overpayments and underpayments and Statutory Interest thereon from March 1, 1986, to the end of the month in which this Judgment is entered.

8.3. The adjusted refund referred to in Paragraph 8.2 above shall be applied as a credit against payments due from the District to the United States as provided in Paragraph 13.2 below.

8.4. Notwithstanding the credit provided for in Paragraph 8.3 above, (a) in the first year after this Judgment is entered, the District shall levy, and

apportion within the District as authorized by law, and the landowners in the District shall pay to the District assessments in the total amount of said credit and (b) the District shall deposit the assessments so paid into a special Overpayment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of the Overpayment Refund Account. The money in the Overpayment Refund Account shall be refunded or used as provided in Paragraphs 9.6.2 and 9.6.3 below.

9. Overpayment Credits and Underpayment Debits to Water Users.

9.1. The District shall establish a bookkeeping account for every District water user who purchased water from the District for use during the Bookkeeping Account Period.

9.2. Each water user's bookkeeping account shall show, as a credit, the amount of overpayments to the District and, as a debit, the amount of underpayments to the District for the various categories of water purchased by such water user for use during the Bookkeeping Account Period and the amount of Statutory Interest properly attributable thereto as determined by the District. Exhibit J attached hereto shows the totals of all overpayments and underpayments to the District for the Bookkeeping Account Period for the various categories of water as of February 28, 1986. Said totals shall be adjusted to reflect overpayments and underpayments from March 1, 1986, through the end of the month in which this Judgment is entered. In allocating these adjusted totals and Statutory Interest thereon among the various water user's bookkeeping accounts, the District

shall be guided by the principles set forth in Paragraphs 9.2.1 through 9.2.5 below.

9.2.1. All the water purchased by agricultural water users in Areas 1A and 1B has been "San Luis agricultural" ("SL AG") water. The remaining SL AG category water not purchased by agricultural water users in Areas 1A and 1B for use in each year has been purchased by agricultural water users in Areas 2A and 2B in proportion to the total amount of water purchased by each such water user for use in such year. However, as an exception to the first sentence of Paragraph 9.2.1 above, SL AG water is deemed to have become "San Luis Agricultural operation and maintenance" ("SL AG O&M") water to the extent the water was delivered for use to lands subject to the operation and maintenance water rate pursuant to Section 208 of the 1982 Act.

9.2.2. Agricultural water users in Areas 2A and 2B have purchased all the "Mendota Pool agricultural water" ("MP AG") each year in proportion to the total amount of water purchased by each such water user for use in such year.

9.2.3. The remainder of the total amount of water which has been purchased by each agricultural water user in Area 2A and 2B for use in each year has been "San Luis agricultural excess" ("SL AG EX") water.

9.2.4. All the water which has been purchased by agricultural water users in areas annexed to the District after June 29, 1965, has been SL AG EX water.

9.2.5. Municipal and industrial water users in the District have purchased and used only "San Luis Municipal and Industrial" ("SL M&I") water.

9.3. Each water user's bookkeeping account shall also show, as a debit, such water user's share of the total payment by the District of court costs and attorneys' fees and expenses as provided for in Paragraph 19 below.

Each water user's share shall be the same proportion of said total payment as the total amount of water purchased by such water user from the District for use during the Bookkeeping Account Period is of the total amount of water purchased by all water users from the District for use during the Bookkeeping Account Period.

9.4. Each water user's bookkeeping account shall also show such water user's net credit or net debit, taking into account the credits and debits described in Paragraphs 9.2 and 9.3 above.

9.5. Each water user having a net debit in such water user's bookkeeping account shall be obligated to pay the District the amount thereof, together with Statutory Interest on the unpaid balance beginning the first day of the month after this Judgment is entered. The District shall take such action as it deems appropriate to collect the amount owed, including but not limited to adding such amount to such water user's water purchase payment obligations. The amount collected shall be deposited into and become part of the Overpayment Refund Account established by Paragraph 8.4 above.

9.6. The net credits in the water users' bookkeeping accounts shall be refunded as provided in Paragraphs 9.6.1 through 9.6.3 below.

9.6.1. The total amount of money released to the District from the Existing Trust Fund under Paragraph 8.1 above, less the amount paid for court costs and attorneys' fees and expenses as provided in Paragraph 19 below, shall be apportioned among and paid to all the water users having net credits in proportion to their net credits.

9.6.2. When the required money has been deposited in the Overpayment Refund Account under Paragraphs 8.4 and 9.5 above, the money therein shall be apportioned among and paid by the District as soon as

practicable to all the water users having net credits in proportion to their net credits. Upon such payments being completed, said net credits shall be deemed fully refunded.

9.6.3. If the District is unable to locate a particular water user to refund the net credit to which such water user is entitled, the amount due such water user shall be used as determined by the District.

* * *

15. Past Contracts, Water Allocation and Pricing.

All parties have voluntarily dismissed with prejudice all claims for relief pleaded in these actions arising out of any Interim Contract, Exhibit H, any Internal Allocation Rule or any Internal Pricing Rule, except that the District and the United States retain any claim for relief arising out of Exhibit H. No party shall recover any damages or obtain any other judicial relief in any action against any other party based on such past actions, except as provided in Paragraphs 8 and 9 above and Exhibit H. Notwithstanding the foregoing, any landowner or water user may assert in any other action any claim for relief referred to in Paragraphs 14.1.6 and 14.1.7 above and seek any remedy provided by law with respect thereto.

* * *

17.6. Except as provided in Paragraph 7.3.1 above and Paragraph 18 below, the District shall not charge any water user more for water service or Drainage Service than the charges required to be paid to the United States for such service, plus any appropriate District charges to cover District costs reasonably necessary in making such service available within the

District and in operating the District, including but not limited to compliance with this Judgment. Except as required by the 1982 Act and as provided in Paragraph 18 below, the District shall adopt no Internal Pricing Rule in the future which imposes a water service charge for the water allocated to Area 1A and Area 1B which is greater than the price of water which the District is obligated to pay under the 1963 Contract, plus the appropriate District charges referred to in the preceding sentence.

* * *

23. Judgment and Stipulation for Compromise Settlement Not a Contract.

Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act.

* * *

(3)

No. 90-409

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

BOSTON RANCH COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

KENNETH W. STARR
*Solicitor General*

RICHARD B. STEWART
*Assistant Attorney General*

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners do not have contractual rights to continue to receive water from a federal reclamation project at a fixed rate to irrigate their excess lands.

2. If petitioners do have contractual rights to receive the water at a fixed rate, whether Section 224(h) of the Reclamation Reform Act of 1982, which has the effect of prospectively increasing the price that petitioners must pay to receive the water, abrogates petitioners' contractual rights in violation of the Fifth Amendment.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 15 |
| Conclusion | 23 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956) | 16 |
| *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) | 16, 17, 19, 21 |
| *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) | 14, 16 |
| *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990) | 18 |
| *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275 (1958) | 17, 20 |
| *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987) | 21 |
| *National Land for People* v. *Kleppe*, 417 F. Supp. 449 (D.D.C. 1976) | 8, 10 |
| *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) | 21 |
| *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978) | 21 |
| *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) | 18 |
| *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) | 22 |
| *The Sinking-Fund Cases*, 99 U.S. 700 (1878) | 21 |
| *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) | 19 |
| *Westlands Water Dist.—Legal Questions*, 85 Interior Dec. 297 (1978) | 11 |
| *Wickard* v. *Filburn*, 317 U.S. 111 (1942) | 20 |

Constitution, statutes and regulations: Page

U.S. Const.:
Art. 1, § 10, Cl. 1 (Contract Clause) ..... 18
Amend. V ..... 14, 18
Due Process Clause ..... 19
Just Compensation Clause ..... 21, 22
Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 ..... 5
§ 1(a), 74 Stat. 156 ..... 5
Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185 ..... 11
§ 122, 99 Stat. 1320 ..... 11
Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636 ..... 4
§ 46, 43 U.S.C. 423e ..... 4, 6
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 ..... 12
§ 5302, 101 Stat. 1330-268 to 1330-269 ..... 12
Reclamation Act of 1902, ch. 1093, 32 Stat. 388
§ 1, 43 U.S.C. 391 ..... 2
§ 2, 43 U.S.C. 411 ..... 2
§ 4, 43 U.S.C. 461 ..... 3
§ 5, 43 U.S.C. 431 ..... 3
§ 6, 43 U.S.C. 491 (32 Stat. 389) ..... 3
§ 10, 43 U.S.C. 373 ..... 3
Reclamation Extension Act of 1914, ch. 247, 38 Stat. 686 ..... 3
§ 5, 43 U.S.C. 492 ..... 3
Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* ..... 5
§ 9(e), 43 U.S.C. 485h(e) ..... 5
Reclamation Reform Act of 1982, Tit. II, 43 U.S.C. 390aa *et seq.* ..... 8
§ 203, 43 U.S.C. 390cc ..... 9
§ 203(a), 43 U.S.C. 390cc(a) ..... 9
§ 203(b), 43 U.S.C. 390cc(b) ..... 9-10, 22
§ 204, 43 U.S.C. 390dd ..... 20
§ 205(b), 43 U.S.C. 390ee(b) ..... 20

Statutes and regulations—Continued: Page

§ 205(c), 43 U.S.C. 390ee(c) ..... 9, 10, 12
§ 208(b), 43 U.S.C. 390hh(b) ..... 20
§ 209, 43 U.S.C. 390ii ..... 8
§§ 209-230, 43 U.S.C. 390ii-390zz-1 ..... 10
§ 209(a), 43 U.S.C. 390ii(a) ..... 8
§ 209(e), 43 U.S.C. 390ii(e) ..... 8-9, 10
§ 224(h), 43 U.S.C. 390ww(h) ..... 12, 13, 14, 18, 19, 20, 21, 22

43 C.F.R.:

Section 426.11(i)(1) (1984) ..... 10
Section 426.11(i)(4) ..... 10, 13
Section 426.11(i)(4)(ii) ..... 13

Miscellaneous:

35 Cong. Rec. (1902):

p. 1383 ..... 2
p. 6734 ..... 2

48 Fed. Reg. 54,781 (1983) ..... 10

53 Fed. Reg. (1988):

p. 21,857 ..... 13
p. 21,860 ..... 13
p. 50,530 ..... 13
p. 50,534 ..... 13

H.R. Rep. No. 399, 86th Cong., 1st Sess. (1960) ..... 5
H.R. Rep. No. 458, 97th Cong., 2d Sess. (1982) ..... 3
S. Rep. No. 373, 97th Cong., 2d Sess. (1982) ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 90-409

BOSTON RANCH COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is reported at 899 F.2d 814. The memorandum decision of the district court (Pet. App. C1-C12) is not reported.

### JURISDICTION

The decision of the court of appeals was entered on March 16, 1990, and amended on June 7, 1990. A petition for rehearing was denied on June 7, 1990 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners receive irrigation water from a federal reclamation project pursuant to certain water service contracts. They contend that the contracts and a subsequent stipulated judgment give them the right to continue to receive irrigation water at a highly subsidized price for their "excess lands" and that Congress has unlawfully abrogated that right. The court of appeals rejected petitioners' interpretation of the contracts and the judgment and held, alternatively, that even if petitioners had such rights, Congress did not act unlawfully in requiring that petitioners pay "full cost" for receipt of the water.

1. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, created a federal program to encourage settlement of the West through the provision of irrigation water for arid lands. Congress specifically wished to encourage the establishment of modest sized family farms owned and operated by families that resided upon them. See, *e.g.*, 35 Cong. Rec. 1383, 6734 (1902). To achieve that goal, Congress limited the potential beneficiaries of the program and the size of the subsidiary that they could receive.

Section 1 of the Act created a reclamation fund to be used "in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western states. 43 U.S.C. 391. Section 2 authorized the Secretary of the Interior to carry out the activities described in Section 1. 43 U.S.C. 411. Section 4 empowered the Secretary, among other things, to determine the charges to be paid by the water users, such charges to be fixed "with a view of returning to the

reclamation fund the estimated cost of construction of the project." 43 U.S.C. 461. The Act, however, did not provide for the return of interest on the government's construction costs.

Section 5 of the Act directly implemented Congress's intent to promote family farms, to spread widely the benefits of the reclamation program, and to prevent speculation. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 8 (1982). That provision states in relevant part:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

43 U.S.C. 431. Section 10 of the Act authorized the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373.

Congress subsequently modified the reclamation program created by the 1902 Act through the Reclamation Extension Act of 1914, ch. 247, 38 Stat. 686. Section 5 of that statute provided that, in addition to the construction charge, project participants would also be required to pay an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or particular project

units. 43 U.S.C. 492.[1] Thereafter, Congress enacted the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 46 of the 1926 Act generally provided that no water shall be delivered from any new federal reclamation project unless the Secretary of the Interior has entered into a contract with an irrigation district or districts organized under state law, which contract shall provide for payment by the district or districts of the cost of constructing, operating, and maintaining the project works. 43 U.S.C. 423e.[2] Section 46 further stated that such contracts shall provide:

> that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior * * *.

43 U.S.C. 423e.

---

[1] Under Section 6 of the 1902 Act, operation and maintenance costs had been paid from the Reclamation Fund until such time as the construction charges for the major portion of the lands within the project were paid. See 32 Stat. 389.

[2] Prior to 1926, the Secretary of the Interior had entered into contracts directly with the individual water users.

Congress revisited the reclamation program in the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* Section 9(e) of the 1939 Act authorizes the Secretary to enter into either long- or short-term contracts to furnish water for irrigation purposes. 43 U.S.C. 485h(e). Such water service contracts shall be for periods not to exceed 40 years and "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. 485h(e).

2. In 1960, Congress authorized the San Luis Unit of the Central Valley Project "for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California * * *." Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156. Section 1(a) of the 1960 Act stated, in part, that "[i]n constructing, operating, and maintaining the San Luis unit, the Secretary shall be governed by the Federal reclamation laws." *Ibid.* As the House Report explains, Congress expected that the acreage limitations of the federal reclamation laws would "cause the large holdings to be broken up into family-size operations." H.R. Rep. No. 399, 86th Cong., 1st Sess. 2-3 (1960).

In 1963, the United States and the Westlands Water District entered into a 40-year water service contract pursuant to the federal reclamation laws that provided, among other matters, for the delivery of irrigation water from the San Luis Unit to the District at a rate of $7.50 per acre-foot plus a $0.50 per acre-foot drain service charge. Pet. App. K8. Articles 23-25 of the 1963 contract specifically addressed "ex-

cess lands" in accordance with Section 46 of the Omnibus Adjustment Act of May 25, 1926, 43 U.S.C. 423e (p. 4, *supra*). Pet. App. K11-K16.

Article 23(a) provided, *inter alia*, that no water made available under the 1963 contract shall be furnished to any excess lands unless the owners have executed valid recordable contracts agreeing to the provisions of Articles 23-25 of the contract. Pet. App. K11. Article 23 required the landowner to sell his excess lands at an appraised price that excluded value attributable to the construction of the reclamation project. Pet. App. K11-K12. Article 25(b) provided that each large landowner "as a further condition precedent to the right to receive water made available, pursuant to this contract for any of his excess land" shall execute a valid recordable contract with the United States agreeing to dispose of his excess lands "to persons who can take title thereto as non-excess land" within 10 years (*id.* at K14) and further agreeing that if the landowner fails to dispose of the excess land within 10 years, the Secretary may sell the lands (*ibid.*). Compare 43 U.S.C. 423e.

Thereafter, the United States and petitioners, who are large landowners holding excess lands within the Westlands Water District, executed recordable contracts pursuant to the federal reclamation laws and the 1963 contract.[3] All of these contracts are similar

---

[3] In 1972, petitioner Boston Ranch Company executed two recordable contracts covering a total of 23,711 acres of excess lands. Pet. App. A4 n.2. Petitioner West Haven Farming Co. executed five recordable contracts covering a total of 5,566 acres of excess land in 1973 and 1974. *Ibid.* Petitioner Edwin R. O'Neill executed three recordable contracts covering a total of 974 acres of excess land in 1969 and 1970. *Ibid.*

in form. The introductory paragraphs of the recordable contracts state that they are being made pursuant to the federal reclamation laws. Pet. App. L2. Those paragraphs also refer to the 1963 contract between the United States and the Westlands Water District ("District Contract"), including, specifically, Articles 23, 24, and 25 of the District Contract, and recite that the recordable contracts are being made in consideration of, among other things, "the direct and indirect benefits to be derived under the terms of the District Contract." *Id.* at L2-L3.[4]

3. In 1976, the United States District Court for the District of Columbia directed the Secretary of the Interior to initiate formal rulemaking concerning the approval of excess land sales and it entered an injunction barring the Bureau of Reclamation, Department of the Interior, from approving excess land sales in the Westlands Water District pending the

---

[4] Like the District Contract, the recordable contracts provide for the appraisal of the excess lands in a manner whereby "no value shall be given such land on account of the existing or prospective availability of water or service from the Central Valley Project" and state that the landowner agrees that he shall not sell his excess lands at prices exceeding such appraised values. Pet. App. L5-L6. The landowner also confers on the Secretary the authority "to sell and transfer at any time following the expiration of a period of ten (10) years immediately following the date of execution of this agreement, all of its then right, title, and interest in and to any or all of the excess land." *Id.* at L7. Finally, the recordable contracts also provide that the computation of the 10-year period "shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner." *Id.* at L8.

completion of the rulemaking.[5] *National Land for People* v. *Kleppe*, 417 F. Supp. 449 (D.D.C. 1976). The Secretary subsequently published proposed regulations concerning excess land sales. Those regulations, however, never became finalized. Instead, Congress enacted new legislation revising the reclamation program.

The Reclamation Reform Act of 1982 (RRA), Tit. II, 43 U.S.C. 390aa *et seq.*, was enacted to provide, among other things, "a modern policy expression regarding Federal reclamation law in order to resolve the many controversies which would otherwise result from the implementation of regulations based upon current law." S. Rep. No. 373, 97th Cong., 2d Sess. 11 (1982). The 1982 legislation comprehensively revised the federal reclamation laws. Several of these revisions are pertinent here.

First, Section 209 addresses the disposition of excess lands. See 43 U.S.C. 390ii. Section 209(a) provides, in substance, that no irrigation water from federal reclamation projects shall be delivered for use in the irrigation of lands held in excess of the ownership limitations imposed by federal reclamation law unless and until the landowners thereof shall have executed a recordable contract requiring the disposal of such excess lands within a reasonable time, which period is defined to be not more than ten years from the date of execution of the contract in the case of recordable contracts entered into prior to the enactment of the RRA. 43 U.S.C. 390ii(a). Section 209(e)

---

[5] Although the federal reclamation laws had authorized the Secretary to issue rules and regulations in furtherance of their purposes, the Secretary had never implemented that authority through formal rulemaking regarding the approval of excess land sales.

provides, however, that where an owner of excess lands has previously entered into a recordable contract and the Secretary has withheld the processing or approval of the disposition of such excess lands, the date for disposing of such lands shall be extended by a period equal to the amount of time the Secretary withheld such processing. 43 U.S.C. 390ii(e). See Pet. App. G1.

Second, Section 205(c) states that notwithstanding any extension of time as provided in Section 209(e), excess lands covered by recordable contracts executed prior to the enactment of the RRA shall be eligible to receive irrigation water at less than "full cost" for a period not to exceed ten years from the date of execution of the contracts. 43 U.S.C. 390ee(c).[6] The right to receive water at less than full cost, however, would not terminate sooner than 18 months after the date on which the Secretary recommended processing or approval of excess land sales. 43 U.S.C. 390ee(c). See Pet. App. G2.

Finally, Section 203 addresses the applicability of the various RRA provisions to new, amended, or existing contracts. See 43 U.S.C. 390cc. Section 203 (a) provides that all of the provisions of the RRA shall be applicable to any district that enters into a new contract with the Secretary, or that thereafter amends an existing contract so as to receive supplemental or additional benefits, or that amends an existing contract for the purposes of conforming to the RRA. 43 U.S.C. 390cc(a). In addition, Section

---

[6] The term "full cost" as used in the RRA indicates a rate of return to the government that takes into account interest upon the government's project construction costs as well as recovery of construction costs and operation and maintenance costs.

203(b) expressly makes Sections 209 through 230 of the RRA applicable to all existing contracts. 43 U.S.C. 390cc(b). See Pet. App. G1.

4. Following passage of the RRA, the Secretary commenced rulemaking proceedings to adopt regulations pursuant to the new statute. The question arose whether Section 205(c), which requires water recipients to pay "full cost" for water supplied to excess lands, applies to extended pre-existing contracts. See Pet. App. A9-A10. The regulations that the Secretary ultimately issued stated in relevant part (Pet. App. H1):

> Land under recordable contract which is held by a water user not subject to the discretionary provisions of [the RRA] may continue to receive irrigation water at the contract water rate for the extended term of the contract. * * *

43 C.F.R. 426.11(i)(4) (1984) (Pet. App. H1). See 48 Fed. Reg. 54,781 (1983). That regulation had the effect of rendering the "full cost" pricing provisions of Section 205(c) of the RRA inapplicable to petitioners' excess lands.

The Secretary recommenced processing of excess land sales in the Westlands Water District on July 10, 1984, approximately eight years after entry of the injunction in *National Land for People* v. *Kleppe*, *supra*. See 43 C.F.R. 426.11(i)(1). Shortly thereafter, the Secretary implemented Section 209(e) by executing amendatory recordable contracts with petitioners Boston Ranch and West Haven that extended the maturity date in Paragraph 11 of those petitioners' recordable contracts by approximately eight years. Pet. App. A10, n.7.

5. As discussed above (p. 5, *supra*), the United States and the Westlands Water District entered into

a long-term water service contract in 1963. However, for various reasons, no water was supplied pursuant to that contract for many years. Rather, water was continuously delivered to Westlands pursuant to a series of short-term contracts. In 1978, the Solicitor of the Department of the Interior issued an opinion that cast doubt whether the United States was under a binding obligation (or was authorized) to deliver water for all of Westlands. *Westlands Water District—Legal Questions*, 85 Interior Dec. 297. See Pet. App. A7-A8.

In 1979, various landowners in Westlands, including petitioners Boston Ranch and O'Neill, filed an action in state court against the District and asserted certain priorities over other water users. The case was removed to federal court and the United States was subsequently joined as a party. *Barcellos and Wolfsen, Inc.* v. *Westlands Water Dist.*, No. CV 79-106-EDP (E.D. Cal.). Thereafter, Westlands filed a separate, but related, action against the United States. *Westlands Water Dist.* v. *United States*, No. CV F-81-245-EDP (E.D. Cal.). The federal district court consolidated the cases. Pet. App. A7.

The parties negotiated a settlement and agreed upon the terms and conditions of a judgment. Pet. App. A10-A11. The proposed settlement was submitted to Congress for review pursuant to Section 122 of the Act of Dec. 19, 1985 (Further Continuing Appropriations Act for FY 1986), Pub. L. No. 99-190, 99 Stat. 1185, 1320, which barred Interior from expending funds on the submission of the settlement to the District Court "until the Congress has received from the Secretary and reviewed for a period of 30 days a copy of the proposed settlement agreement which has been approved and signed by the Secretary." When Congress took no further legislative ac-

tion, the settlement was submitted to the district court, which entered the agreed-upon judgment on December 30, 1986. Pet. App. A11, N1-N18. The judgment states, in pertinent part, that the United States shall refund certain contract overpayments and that the United States and the District shall perform the 1963 Contract, subject to certain provisos not relevant here. Pet. App. N2-N3. The judgment does not discuss the question of the price of water for excess lands under extended terms contracts. Pet. App. A11-A12, A25.

6. On December 22, 1987, the President signed the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. Section 5302 of that statute, entitled "Reclamation Reform Act Amendments" (101 Stat. 1330-268 to 1330-269), amended the RRA by, among other things, adding Section 224 (h), which states as follows:

> The provisions of section 205(c) are and have been applicable to all recordable contracts executed prior to October 12, 1982, and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked: *Provided*, That notwithstanding the provisions of subsection (i), the Secretary shall not seek reimbursement for any amounts due under this subsection or section 205(c) which was due prior to the date of enactment of this subsection.

43 U.S.C. 390ww(h). Section 224(h) had the effect of invalidating the Secretary's regulation (p. 12, *supra*) interpreting Section 205(c)'s "full cost" pricing provisions as inapplicable to petitioners' excess lands.

On June 10, 1988, Interior published in the Federal Register proposed rules concerning the 1987 amend-

ments to the RRA, 53 Fed. Reg. 21,857, 21,860. Final rules and regulations were published on December 16, 1988, 53 Fed. Reg. 50,530, 50,534. As revised in light of the 1987 Amendments, 43 C.F.R. 426.11(i)(4) now provides that land under recordable contract may continue to receive irrigation water deliveries at the non-full-cost rate for the original disposition period of the recordable contract but further states in Subsection (ii):

> For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate described in § 426.7(f)(1) commencing December 23, 1987, through the effective termination date of the extended recordable contract.

Hence, beginning on December 23, 1987, petitioners have been required to pay for federal project water at a full cost rate for federal reclamation project irrigation water delivered for use on their excess lands subject to the extended recordable contracts.

7. In 1988, petitioners filed a motion to enforce the 1986 judgment against the Department of the Interior and Interior officials. The motion alleged, in substance, that petitioners were entitled to receive federal reclamation water for use on their excess lands at the rate of $8 per acre-foot, notwithstanding Section 224(h) of the RRA. The district court denied the motion to enforce the judgment. Pet. App. C1-C17.

The court of appeals affirmed. Pet. App. A1-A41. The court first rejected petitioners' contention that Section 224(h) does not apply to water delivered for use on petitioners' excess lands. Pet. App. A13-A15. It next adressed petitioners' assertion that Section

224(h) violated their Fifth Amendment rights to due process and just compensation by depriving them of their contractual rights to receive federal project water at a less than full-cost rate. Pet. App. A15-A25. The court explained that petitioners must initially "demonstrate that they *had* such a contractual right before the enactment of § 224(h)." *Id.* at A16. The court concluded that petitioners lacked such rights. *Id.* at A17-A25.

The court explained that nothing in the District Contract or petitioners' individual recordable contracts addresses what price should be charged for water delivery to excess lands when—as here—the 10-year deadline for selling such land expires. Pet. App. A17-A23. In the face of the contract's silence, the court concluded that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public." *Id.* at A23 (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837)). The court accordingly held that petitioners "never had a contractual right to receive more than ten years of water for their excess lands" and that "Congress, in enacting § 224(h), did not deprive them of a property right within the meaning of the fifth amendment." Pet. App. A25.

The court also rejected petitioners' contention that Section 224(h) violated the principle of separation of powers by modifying the 1986 stipulated judgment concerning the District contract. Noting that the 56-page judgment nowhere discusses the issue of the price of water to be used to irigate excess lands under extended recordable contracts, the court found that Section 224(h) was not inconsistent with the judgment. Pet. App. A25. Judge Fernandez dissented. *Id.* at A26-A41.

Petitioners filed a petition for rehearing challenging, among other things, the court of appeals' reliance on the *Charles River Bridge* decision. The court denied the petition, amending its opinion to state:

> The *Charles River Bridge* rule is simply another way of stating that "government contracts 'should be construed, if possible to avoid foreclosing exercise of sovereign authority.'" *Peterson* v. *Dept. of Interior*, [899 F.2d 799, ~~807~~ (9th Cir. 1990), petition for cert. pending No. 90-357] (quoting *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52 (1986)).

Pet. App. B1-B2.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision in this case lacks national importance and continuing significance. The questions presented in this case, which involve the scope of a subsidy enjoyed by a limited number of geographically concentrated agricultural entities, turn on the proper interpretation of certain contracts, executed years ago, in light of unanticipated circumstances. Accordingly, further review is not warranted.

1. Petitioners assert (Pet. 14-22) that the court of appeals adopted an incorrect approach for ascertaining whether they have contractual rights to receive federal reclamation project water at the $8 per acre-foot rate for use on their excess lands. Specifically, petitioners contend that the court erred "by holding that inexplicit terms in commercial contracts or consent judgments against the government are automatically construed in favor of the government."

Pet. 14. Petitioners' characterization of the court's holding is inaccurate and, in any event, does not warrant further review.

Petitioners base their challenge on the court of appeals' quotation of a passage from this Court's *Charles River Bridge* decision stating that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public." 36 U.S. (11 Pet.) at 544. See Pet. App. A23. This Court, however, reviews judgments, not statements in opinions. See, *e.g.*, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). In any event, the court of appeals indicated in its response to petitioners' petition for rehearing that the court was not holding that commercial contracts and consent judgments are "automatically construed in favor of the government." Pet. 14. The court explained that its reliance on *Charles River Bridge* was simply another way of stating that "government contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Pet. App. A23 n.18, B1-B2 (citing *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986)).

Petitioners are mistaken in suggesting that this principle does not apply to "commercial contracts." Pet. 15-16. Indeed, as this Court indicated in *POSSE*, the principle originated in disputes involving commercial contracts:

> While the Federal Government, as sovereign has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, * * * we have declined in the context of *commercial contracts* to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract.

> * * * Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs *all contracts* subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

477 U.S. at 52 (emphasis added). In this case, the water service contracts contained "no explicit provisions" addressing the price of federal reclamation project water for excess lands that remained unsold after 10 years. Pet. App. A23-A24.[7] The court of appeals reasonably concluded, in accordance with *POSSE*, that the contracts did not foreclose Congress from enacting prospective legislation setting the price for such water to assure the future equitable distribution of the federal subsidy. *Ibid.*[8]

Petitioners ultimately contend that the court of appeals misinterpreted the particular contracts and consent judgment involved in this case. Pet. 17-22.

---

[7] As the court of appeals explained, the various contracts, at most, set a price for water that was delivered to the excess lands during the ten-year period when those lands were to be sold. Pet. App. A16-A23. The terms of the contracts "do[] not answer the question of what rights, if any, are given by the contracts to a landowner whose ten years has expired." *Id.* at A17.

[8] "From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good." *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 292 (1958). Accordingly, courts should not lightly find an implied contractual surrender of Congress's power to adjust prospectively the distribution of benefits.

Petitioners' contentions are unpersuasive.[9] In any event, those contentions, which raise no important question of federal law and turn on the specific terms of the underlying documents and the unique circumstances of this case, plainly do not raise any issue that would warrant this Court's review. See *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, 110 S. Ct. 2034, 2042 (1990) (Rehnquist, C.J., concurring). And, since the judgment below independently rests on the court of appeals' resolution of these unique questions, the case is not an appropriate one for this Court's consideration of petitioners' additional contentions.

2. Even if the contracts could be construed as confering a right to the delivery of subsidized water for use on excess lands for the remaining terms of the extended recordable contracts, Section 224(h) would nonetheless pass constitutional scrutiny. Contrary to petitioners' assertions (Pet. 22-28), that statutory provision does not offend petitioners' Fifth Amendment rights nor does it violate the principle of separation of powers.

a. The Contract Clause of the United States Constitution does not apply to the actions of the federal government. *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 732, n.9 (1984). Rather, federal legislation affecting contracts is evaluated under the "less searching standards" of the

---

[9] For example, petitioners Boston Ranch and West Haven assert that "they supported the 1963 contract on the assumption they would 'pay no more than $8.00 per acre foot . . . through the date of sale' of their excess lands." Pet. 19. As we have noted, however, Paragraph 25(a)(i) of the 1963 contract expressly contemplated that excess landowners would dispose of their excess lands within ten years. Accordingly, petitioners could not have reasonably assumed that they would receive water at the $8 rate for more than ten years.

Due Process Clause of the Fifth Amendment. *Id.* at 733. Even if a contractual impairment has been established, the courts will weigh the competing interests and may hold that the public interest outweighs the private party's contractual interests. "As with laws impairing the obligations of private contracts, an impairment [of a government contract] may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977).

The nature of the asserted contract right and the extent of its impairment are relevant factors in the due process analysis. *POSSE*, 477 U.S. at 55; *United States Trust Co.*, 431 U.S. at 27. Another relevant concern is the degree to which the challenged legislation is "purely financial" in effect, rather than serving broader social purposes. *Id.* at 24-25. Applying these factors here, Section 224(h) clearly passes Due Process scrutiny.

First, petitioners' assertion that their contractual interests have been impaired is, at best, tenuous. Petitioners originally contracted for a right to receive federal reclamation project water to irrigate their excess lands for ten years only—the 1963 District Contract and the recordable contracts required disposition of that land at the end of the ten-year period. Nevertheless, by the time that Section 224(h) was enacted in December 1987, petitioners had received federal project water at the 1963 District Contract price of $8 per acre-foot for at least 13 years and as long as 17 years. Thus, petitioners have received the full benefit of their contractual bargain and an added measure as well.[10]

---

[10] Furthermore, petitioners had received other benefits from the enactment of the RRA. As originally executed, the re-

Petitioners' attenuated contractual interest must be weighed against Section 224(h)'s significant public purpose. As we have explained, the federal reclamation laws have sought to distribute the federal reclamation project benefits broadly. Indeed, the excess land limitations were designed to prevent an inequitable distribution of program benefits. As this Court observed in *Ivanhoe*:

> It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large holdings.

357 U.S. at 297. Petitioners have enjoyed the retention of excess lands and the receipt of a low-cost federally subsidized water service for a longer period than their contracts contemplated. Congress did not violate petitioners' due process rights by requiring that petitioners pay an equitable share of the government's future costs of providing that water.[11]

---

cordable contracts at issue obligated each petitioner to divest himself of all but 160 acres of his irrigable lands. Under the RRA, however, an excess landowner who is a qualified recipient and elects to come under the coverage of the discretionary provisions of the RRA is entitled to permanently retain 960 acres of his irrigable lands. Federal reclamation project water will be delivered to irrigate those lands at a charge sufficient to cover only the petitioners' share of the government's operations and maintenance costs. See Sections 204, 205(b), 208(b), 43 U.S.C. 390dd, 390ee(b), 390hh(b).

[11] "[I]t is hardly lack of due process for the Government to regulate that which it subsidizes." *Ivanhoe*, 357 U.S. at 295 (quoting *Wickard* v. *Filburn*, 317 U.S. 111, 131 (1942)). Moreover, Section 224(h) does not "take away property al-

b. Similarly, Section 224(h) does not effect a taking of petitioners' property interests within the meaning of the Just Compensation Clause. Not every governmental action that adversely affects property interests constitutes a taking; rather, the government may enact a wide variety of measures to promote the general welfare without incurring an obligation to pay compensation. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987). There is no fixed formula for ascertaining whether government action constitutes a taking; rather, that question must be determined based on an evaluation of the specific facts involved in each case. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978). In making the determination, the courts will consider the nature and character of the governmental action in question and will weigh those factors against the economic impact of the regulation upon the claimant. *Ibid.*; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 492 (1987).

In this instance, Congress's action falls short of a taking. The United States has a strong and continuing interest in supervising the reclamation program and insuring that its fundamental purposes are not frustrated by an inequitable distribution of the federal subsidy. Section 224(h) was enacted to further this interest. Petitioners cannot convincingly argue that Section 224(h) constitutes an undue imposition upon their reasonable "investment-backed expectations." *DeBenedictis* 480 U.S. at 485. As we have explained, both the District Contract and the record-

---

ready acquired * * * or deprive [petitioners] of the fruits actually reduced to possession of contracts lawfully made." *POSSE*, 477 U.S. at 55 (quoting *The Sinking-Fund Cases*, 99 U.S. 700, 720 (1878)).

able contracts expressly contemplated that excess landowners would have 10 years, and only 10 years, in which to divest themselves of their excess lands. Petitioners had no reasonable investment-backed expectation of owning the excess lands more than 10 years after executing the recordable contracts—much less a constitutionally protected right to receive low-cost water for use on those lands for some 18 years. Hence, Section 224(h) does not constitute a taking of any investment-backed expectations in violation of the Just Compensation Clause.[12]

c. Section 224(h) likewise does not present any substantial separation of powers questions. Petitioners assert that Congress, through Section 224(h), has impermissibly contravened the 1986 stipulated judgment. That judgment, however, does not address the specific issue presented here—namely, the price to be paid for water used to irrigate excess lands retained after the expiration of the 10-year contractual period provided for their disposition. Paragraph 4.1 of the 1986 judgment states that "the District and the United States shall perform the 1963 Contract" subject to certain provisos not relevant here. Pet. App. N2. The 1963 District Contract states that water shall be delivered to excess lands under recordable contracts for 10 years after such contracts are executed, but neither the 1963 District Contract nor the

---

[12] In addition, the Just Compensation Clause bars takings only where no avenue for obtaining just compensation is available. Even if we assume that Section 224(h) does effect a taking of contractual property interests, petitioners have an available and appropriate remedy for compensation under the Tucker Act, 28 U.S.C. 1491. Hence, Section 203(b) may not be set aside as an unconstitutional taking of private property. *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1020 (1984).

1986 judgment addresses any matters concerning continued water service beyond the 10-year period. Moreover, Paragraph 3 of the judgment states that it "shall not * * * confer on any party any right except as expressly provided herein." *Ibid.* Hence, petitioners' contention that Congress has impermissibly interfered with a federal court judgment is without foundation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

KENNETH W. STARR
*Solicitor General*

RICHARD B. STEWART
*Assistant Attorney General*

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
*Attorneys*

NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE, 1990 282061 20185

REP
BRI

PLY
EF

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 90-409

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

EDSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
*Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITIONERS' REPLY BRIEF

---

*Of Counsel:*
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS


| | Page |
|---|---|
| 1. INTERPRETATION ISSUES | 1 |
| (a) *Interpretation Under Ordinary Canons of Construction* | 2 |
| (b) *Interpretation Under The Government's Special Canon of Construction* | 4 |
| 2. CONSTITUTIONAL ISSUES | 5 |
| (a) *Standard Of Review* | 5 |
| (b) *Purpose Of The Statute* | 5 |
| (c) *Appropriate Remedy* | 7 |

# TABLE OF AUTHORITIES

*Cases* Page

*American Stevedores v. Porello*, 330 U.S. 446 (1946) ..... 4
*Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980) ..... 8
*Bowen v. Massachusetts*, 487 U.S. 879 (1988) ..... 8
*Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ..... 4
*Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) ..... 4
*Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958) ..... 5
*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) ..... 4
*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) ..... 7
*United States v. Seckinger*, 397 U.S. 203 (1970) ..... 3
*United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) ..... 5

*Statutes*

2 United States Code
§ 632(a)(2) ..... 6
§ 634(a)(2) ..... 6
§ 639 ..... 6
§ 641(a)(2) ..... 6
§ 641(d)(2) ..... 6

28 United States Code
§ 1491 ..... 7

43 United States Code
§ 390uu ..... 7
§ 423e ..... 5

*Regulations*

43 Code of Federal Regulations
§ 426.11(i)(4) ..... 3

*Congressional Record*

133 Congressional Record
E4995 (daily ed. Dec. 22, 1987) ..... 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 90-409

---

BOSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
*Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITIONERS' REPLY BRIEF

---

Petitioners hereby reply to arguments first raised in the government's brief in opposition to certiorari.

### 1. INTERPRETATION ISSUES

The government offers several arguments about why it thinks that petitioners' contentions that the majority Opinion misinterpreted the contracts and consent judgment are unpersuasive.

**(a) *Interpretation Under Ordinary Canons of Construction***

The government suggests (at 22) that petitioners' contracts "expressly" provide that they would enjoy their rights for only ten years. But it cites no clause so providing, and none exists. Indeed, the government's suggestion conflicts with the finding of the majority Opinion (A23-24) that the contracts are not "explicit" on the point and, therefore, need to be construed.

Petitioners do not here challenge the finding that the contracts and the judgment at bar are not explicit. Instead, petitioners ask the Court to determine what principles of contract interpretation govern an inexplicit commercial contract with, or judgment against, the government. Must a federal court apply the ordinary canons of interpretation? Or may it rely exclusively on the canon that an inexplicit federal obligation will be automatically construed in favor of the government? This question is not unique to this case. It governs every inexplicit contract and consent judgment to which the government is a party.

The government's brief does not contest petitioners' arguments that federal contracts and consent decrees are governed by the ordinary canons of interpretation. (See Pet. at 16-22.) Indeed, its own analysis of the intention of the parties highlights the Ninth Circuit's erroneous failure to consider such factors:

(1) The government (at 18 n. 9) does not dispute that petitioners submitted uncontested testimony in the trial court that they supported the 1963 contract based on the "assumption" that they would pay no more than $8.00 per acre foot for water until they sold their excess lands. However, the government argues that petitioners could not have "reasonably" so assumed. The government presented no evidence in the trial court showing that petitioners' assumption was unreasonable. Its contention of unreasonableness is made here for the first time. Furthermore, petitioners' assumption was reasonable in 1963.

Article 25(b)(i) of the 1963 contract itself contemplated that excess lands might not be sold in ten years.

(2) The government asserts (at 22) that petitioners "had no reasonable . . . expectation of owning their excess lands more than 10 years after executing the recordble contracts." Petitioners disagree. Rule 11(i)(4), which provided that land under extended recordable contract held by a prior law recipient may continue to buy water "at the contract rate for the extended term of the contract," confirmed petitioners' reasonable expectations. 43 CFR § 426.11(i)(4) (1983). The majority Opinion (A24) found as follows: ". . . [w]e do not . . . imply that they lacked any reasonable expectation to receive the water for the extended period of their recordable contracts. Interior's December 1983 regulations created reasonable expectations that the landowners would be able to receive subsidized water for the extended period." Thus, the government's assertion here directly contradicts the finding of the Ninth Circuit.

(3) The government appears to argue (at 21-22) that the reasonable expectations of petitioners to pay the contract rate were not "investment-backed." As a result of agreeing to the 1986 stipulated judgment petitioners and their neighbors released claims and assumed obligations worth millions of dollars. Petitioners presented uncontested testimony in the trial court that they did so in "reliance" upon the fact that they would continue to be able to buy water at the contract rate until their excess lands were sold. Certainly, their reasonable expectations to pay that rate in the future were investment-backed.

The government's own focus on whether petitioner's assumptions and expectations were reasonable and on whether petitioners took detrimental actions in reliance thereon suggests that the intent of the parties must be ascertained in one of two ways. This Court may find that the parties intended and the contracts and judgment mean that the contract rate will be honored until excess

lands are sold. See *United States v. Seckinger*, 397 U.S. 203, 208-16 (1970) (reversed on finding intention of the parties based on appellate record). Alternatively, if further evidence needs to be taken to support these contentions, the matter would warrant a remand to the district court for such purposes. See *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 457-58 (1946) (reversed and remanded to determine intention of the parties and meaning of the contract).

**(b) *Interpretation Under The Government's Special Canon of Construction***

The government argues (at 16-17) that the special canon of construction announced in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 544 (1837) and in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986), applies to commercial contracts of the government. The only support it offers for this proposition is the following quotation from *Bowen*:

> ". . . [W]e have declined in the context of commercial contracts to find that a 'sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in' the contract. . . . Rather, we have emphasized that '[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' *Ibid.*" 477 U.S. at 52.

*Bowen*, itself, did not involve a commercial contract. Therefore, the *Bowen* language was *dicta*. Furthermore, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), the case from which the language was taken, is distinguishable from the case at bar. In that case, an Indian tribe imposed a severance tax on oil and gas removed from tribal lands. Persons who extracted oil and gas under leases with the tribe unsuccessfully challenged the tax under applicable statutes and treaties, governing

principles of Indian sovereignty, and the Commerce Clause of the U.S. Constitution. As *Jicarilla* did not not involve a contract with or a judgment against the federal government, it did not, as here, raise issues under the Fifth Amendment or separation of powers provisions.

## 2. CONSTITUTIONAL ISSUES

The government offers several arguments as to why it contends that, even if the contracts and judgment entitled petitioners to the contract rate for 18 years, Section 224(h) passes constitutional muster.

### (a) *Standard Of Review*

The government appears to concede (at 19) that Section 224(h) must withstand elevated and careful judicial scrutiny, as it quotes *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977) for the proposition that a law impairing a government obligation will be constitutional only if it is ". . . necessary to serve an important public purpose." The Ninth Circuit, instead (A16, A24), adopted the rational basis test. Its failure to exercise careful scrutiny, in itself, is a sufficient reason to grant review.

### (b) *Purpose Of The Statute*

The government, however, misstates what the purpose of Section 224(h) is. Both sides agree about the purpose of the excess land laws, especially Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e. (See Pet. at 4; Opp. at 17 n. 8, 20.) The purpose of Section 46 was to distribute the reclamation benefits, that is, the interest subsidy, to "the largest number of people" or "the greatest number of individuals." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292, 297 (1958). But at issue in this case is the purpose of Section 224(h), which retroactively increased the water rate of certain excess landowners, not Section 46, which prospectively required all excess landowners to agree to sell their lands.

As a preliminary matter, the government asserts (at 17) that the "court of appeals reasonably concluded" that the purpose of Section 224(h) was "to assure the future equitable distribution of the federal subsidy." For this proposition, the government cites the majority Opinion (A23-A24). But, in fact, the Opinion reached no such conclusion at those pages, or elsewhere.

The government also directly argues (at 21) that the purpose behind Section 224(h) was the same purpose as that behind Section 46, as follows: "The United States has a strong and continuing interest in supervising the reclamation program and insuring that its fundamental purposes are not frustrated by an inequitable distribution of the federal subsidy. Section 224(h) was enacted to further this interest." This argument is incorrect. The purpose of Section 224(h) was not to alter the distribution of the interest subsidy by spreading it to more participants, but rather to reduce the amount of the interest subsidy by extracting more federal revenue from certain farmers.

There is no legislative history nor evidence in the record suggesting that the purpose of Section 224(h) was to distribute the benefits of the interest subsidy to more irrigators. As four factors definitively demonstrate, this was a revenue-raising measure, pure and simple.

First, Section 224(h) was enacted as part of a budget reconciliation measure which covers, among other things, "revenue increases." 2 U.S.C. §§ 632(a)(2), 634(a)(2), 639, 641(a)(2), 641(d)(2).

Second, the sponsor of the statute admitted that its purpose was fiscal. Representative Miller told his colleagues that his bill will have the effect of "saving taxpayers tens of millions of dollars." 133 Cong. Rec. E4995 (daily ed. Dec. 22, 1987).

Third, the government's brief in the trial court conceded that Section 224(h) was a revenue-raising measure.

It said: "Section 224(h) was adopted for the specific purpose of relieving the American taxpayer of providing continuing subsidies to the plaintiffs."

Fourth, the sole effect of Section 224(h) has been to raise federal revenues by millions of dollars. It has in no way altered the distribution of program benefits. Nor did it cause excess landowners to sell prematurely. Boston Ranch did not sell its lands until just before its recordable contract so required. West Haven continues still to hold its lands. The only result of the challenged statute is that the government is richer and petitioners are poorer.

**(c) *Appropriate Remedy***

The government argues (at 22 n. 12) that, even if Section 224(h) effects a taking of their rights, petitioners have an "available and appropriate remedy for compensation" under the Tucker Act, 28 U.S.C. § 1491, and, hence, Section 224(h) "may not be set aside as an unconstitutional taking" of those rights under *Ruckleshaus v. Monsanto Co.*, 476 U.S. 986, 1016-20 (1984).

The court in *Monsanto* declined to infer a withdrawal of a Tucker Act remedy from a vague provision, the structure of the statute, or its legislative history. Here, by contrast, Section 221 of the Reclamation Reform Act of 1982 provides an express remedy in the district court. 43 U.S.C. § 390uu. Section 221 reads as follows:

> "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like cir-

> cumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated."

In the litigation underlying the proceedings giving rise to the instant petition, the court held that a less precise statute gave it jurisdiction to adjudicate all rights relating to water. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263, 266-67 (E.D. Cal. 1980). The jurisdiction of the Claims Court is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." *Bowen v. Massachusetts*, 487 U.S. 879; 108 S. Ct. 2722, 2740 n. 48 (1988).

*Monsanto* is further distinguishable from the case at bar. Here, petitioners brought a motion to enforce the judgment in the court which had rendered the judgment in accordance with the terms of the judgment. (See N1-N2.) The disputed surcharges imposed to date have been interpled with the district court pending resolution of this case. Relief is also sought as to future surcharges. At issue here is the validity of the statute imposing the surcharges, as applied to petitioners, under the separation of powers doctrine and the due process clause of the Fifth Amendment. Under such circumstances, the district court had jurisdiction to declare that Section 224(h) comprises an invalid abrogation of petitioners' rights.

Respectfully submitted,

*Of Counsel:*
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
*Attorneys for Petitioners*

Dated: November 14, 1990